Supreme Court, U.S.
FILED

03 332 AUG 25 2003

No. ____

In the Supreme Court of the United States

JOSEPH DODGE, individually and as personal representative of the Estate of Thelma Dodge, et al.,
Petitioners,

v.

COTTER CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. The Tenth and Seventh Circuits have created a hybrid de novo standard of review for the trial court's *application* of *Daubert* procedures, which is in conflict with the other circuits' abuse of discretion standard of review.

   Given this split in the circuits on the standard of review for *application* of *Daubert*, and the difficulties the Tenth Circuit approach creates for the trial court as pointed out by three State Attorneys General, is the Tenth Circuit process of de novo review proper?

2. There is a difference among the circuits on the proper remedy where the appellate court reverses trial results on the basis of an insufficient record on threshold evidentiary issues. The Tenth Circuit held here, and the Ninth Circuit has held, that remand for complete retrial is required. The Second Circuit and District of Columbia Circuit have held that the proper remedy is to remand for further findings or clarification of the basis for the trial court's ruling, without requiring a full retrial in the first instance.

   Given the difference in the circuits and important considerations of judicial economy implicated, did the Tenth Circuit properly remand for full trial, or should it have sent the matter back for further findings before undoing the result of six months' trial time?

3. The Tenth Circuit has held that a final judgment awarding prejudgment interest, which requires only the addition of the actual amount of statutory interest, does not start the time for filing the notice of appeal, thereby expanding the court's jurisdictional limits. The Fourth and Sixth Circuits have held that a judgment is final if it awards

prejudgment interest, even if the calculation of the amount is added later, so that entry of such judgment starts the time for filing the notice of appeal.

Given this conflict among the circuits, was the Tenth Circuit correct in extending the time to file the notice of appeal 101 days after denial of defendant's post-trial tolling motions following the final judgment determining all issues and all damages, and until the non-disputed calculations of prejudgment interest were filled in?

PARTIES TO THE PROCEEDING

Petitioners

Joseph Dodge, individually and as personal representative of the Estate of Thelma Dodge; Rocky Mountain Equestrian Center Inc.; Desiree Chrysler; Daniel Chrysler; August Chrysler; Clayton Chrysler, minors, by and through their parents and next friends, Desiree Chrysler and Daniel Chrysler; Patrick Shane Dodge; Connie Dodge; Nathan Dodge; Leslie Dodge; Bryan Dodge; Patrick Dodge, minors, by and through their parents and next friends, Patrick Shane Dodge and Connie Dodge; Yvonne Pegararo; Noah Welch, a minor by and through his mother and next friend Yvonne Pegararo; Jeremiah Welch; Rhonda Butson; Daniel Slanovich; Gus Slanovich; Chandler Creek Companies; Donald Luna; Sonja Luna; Brett Luna; Norman Platt, individually and as personal representative of the Estate of Dorothy Platt; James L. Treat; Aspen Trust; Bruce Hadley; Virginia Hadley; Jack Hadley; Shaylee Hadley; Kim Myers; Sid Myers; Casey Myers; Chad Myers; Tristan Dodge; Shaylee Dodge; Dolene Blue, individually and as personal representative of the Estate of James Blue; and Russell Jewett; Bonita Jewett; Nard Claar; Sara Claar; Mike Hadley; Catherine Hadley; Linda Johnson; Alicia Johnson; Blaine Johnson, a minor by and through his mother and next friend Linda Johnson; Julie Ann Wright; Jennifer Wright; Nicole Wright, a minor by and through her mother Julie Ann Wright; and Canon Farms Trust, Plaintiffs and Appellees below.

There is no parent corporation or publically held company which owns 10% or more of the corporation's stock for any of the non-governmental corporate Plaintiffs.

Respondent

Cotter Corporation, Defendant and Appellant below. Cotter is a New Mexico corporation which is headquartered in Colorado and wholly owned by General Atomics, a privately held California Corporation.

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Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Tenth Circuit that gives rise to this petition is reported as *Dodge v. Cotter Corp.*, 328 F. 3d 1212 (10th Cir. 2003). A copy of the opinion is included in the Appendix at App. A, 1a-33a. The district court judgments are reprinted at App. E, 50a-55a; App. G, 58a-65a; and App. H, 66a-74a. The previous appeal and reversal of the district court in these cases was reported as *Dodge v. Cotter Corp.*, 203 F.3d 1190 (10th Cir. 2000)(*"Dodge I Opinion"*).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its opinion on April 22, 2003. On May 6, 2003, Petitioners filed a Petition for Rehearing and Rehearing En Banc, which the Tenth Circuit denied on May 28, 2003. A copy of the order is included at App. B, 34a-35a. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED IN THE CASE

Federal Rule of Evidence 702; 28 U.S.C. § 1291; Federal Rules of Civil Procedure 59(e) and 60(a); Federal Rules of Appellate Procedure 4(a)(1)(A) and 4(a)(4)(A); and Federal Rule of Appellate Procedure 29(a). The text of these provisions is reprinted at App. K, 81a-84a.

STATEMENT OF THE CASE

This environmental contamination case involves the claims of 47 plaintiffs against the Cotter uranium mill in Canon City, Colorado.[1] These cases, consolidated under the lead case *Dodge v. Cotter*, were filed in 1991 and assigned to the Honorable Zita L. Weinshienk, who was handling an earlier filed, related group, *Boughton v. Cotter* (*see Boughton v. Cotter Corp.*, 65 F.3d 823 (10th Cir. 1995)). The *Dodge* cases have been tried in three full jury trials. Each time judgment was appealed to and reversed by the Tenth Circuit on procedural bases not related to the merits. Each trial resulted in verdicts against Cotter and in favor of Plaintiffs, which were upheld by the district court.[2] In addition to the private plaintiffs' civil cases for personal injuries and property damage (*Dodge* and *Boughton*), there have been earlier government suits in federal court and state court involving Cotter's contamination.[3]

After the reversal of a portion of these cases (*Dodge I*) by the Tenth Circuit, all the cases were tried to verdicts in two

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[1] A concise summary of the facts is set forth in the *Dodge I Opinion,* 203 F.3d at 1192-93.

[2] The district court had jurisdiction over the original action pursuant to 42 U.S.C. § 9601, *et seq.*, 28 U.S.C. § 1331 and the doctrines of ancillary and pendent jurisdiction.

[3] For example, the State of Colorado sued Cotter for remediation of its contamination in the area involved here, Canon City-Lincoln Park. *State of Colorado v. Cotter Corp.*, Case No. 83-C-2389 (U.S.D.C. Colo. 1983). The State's case was settled by consent decree in 1988. The Cotter mill was designated by the EPA as a Superfund site from 1984 to 2002.

groups (*Dodge II* and *Dodge III*). The Tenth Circuit, at Cotter's request, held the appeal of *Dodge II* for over two years and combined it with the appeal from the remaining cases in *Dodge III*. *See* Order of June 8, 2001, App. F, 56a-57a. The Tenth Circuit then conducted a de novo review of the district court's extensive *Daubert*[4] pretrial and trial procedures and findings, held that the trial court needed to redo the *Daubert* proceedings in some unspecified manner, reversed all the *Dodge II* and *III* judgments (47 cases) and remanded for another yet another retrial of all 47 cases.

ARGUMENT FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS OVER THE PROPER STANDARD OF REVIEW FOR "APPLICATION" OF *DAUBERT*

A. The Seventh and Tenth Circuits' Hybrid "De Novo" Standard of Review of *Daubert* Rulings

The United States Supreme Court has stated that the appellate courts are to review trial courts' *Daubert* analyses using an abuse of discretion standard,[5] and in a concurring

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[4] *Daubert v. Merrell Dow Pharmaceuticals, Inc*, 509 U.S. 579 (1993).

[5] *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997)(appellate court "failed to give the trial court the deference that is the hallmark of abuse-of-discretion review."); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)("That standard applies as much to the trial court's decisions about how to

opinion pointed out that this "is not discretion to abandon the gatekeeping function." *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 158-59 (1999)(Scalia, J., concurring).

The Tenth Circuit in its *Dodge* opinion has interpreted this to mean that the appellate courts should review the trial court's procedures and rulings on experts de novo to determine whether the court *applied Daubert* correctly and thus performed its gatekeeping function. The *Dodge* panel recites:

> We review de novo the question of whether the district court *applied* the proper legal test in admitting an expert's testimony.

App. A at 17a (emphasis added).

This interpretation has also been adopted by the Seventh Circuit. *See, e.g., Chapman v. Maytag Corp.*, 297 F.3d 682, 686 (7th Cir. 2002)("We first undertake a *de novo* review of whether the district court properly followed the analytical framework established in *Daubert*."); *U.S. v. Allen*, 269 F.3d 842, 845 (7th Cir. 2001)("we review whether the trial court properly applied the *Daubert* framework *de novo*.").[6]

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determine reliability as to its ultimate conclusion.").

[6] This language is a remnant from the pre-*Kumho Tire* days when there was a question as to whether *Daubert* applied to non-scientific testimony. A de novo review pre-*Kumho* was used to determine the now-resolved issue of whether *Daubert* applied to the particular kind of expert. *See, e.g., Compton v. Subaru of America, Inc.*, 82 F.3d 1513, 1517-18 (10th Cir. 1996)("The applicability of *Daubert* is a question of law which this court reviews *de novo*. . . . application of the *Daubert* factors is

The Tenth Circuit in *Dodge* and the Seventh Circuit in *Allen* and *Chapman* have created a hybrid de novo standard of review of the trial court's "application" of the *Daubert* factors, in conflict with all other circuits.[7] All of the other circuits interpret this Supreme Court authority to mean that the appellate court must expressly defer to the trial court's *Daubert* determinations and review them only for an abuse of discretion.[8]

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unwarranted in cases where expert testimony is based solely upon experience or training."); *U.S. v. Hall*, 165 F.3d 1095, 1101-02 (7th Cir. 1999).

[7] The same Tenth Circuit judge who wrote the *Dodge* opinion also used this hybrid standard of review of the trial court's *Daubert* decisions in *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000))(opinion of Judge Paul Kelly, Jr.)("We review de novo the question of whether the district court *applied* the proper legal test in admitting [the expert's] testimony.")(emphasis added).

[8] *See* section I.B., *infra*. The standards for granting a petition for writ of certiorari are met here as there is now a circuit split over an important federal issue regarding the proper roles of the appellate and trial courts in managing complex cases involving *Daubert* decisions.

> A petition for a writ of certiorari will be granted only for compelling reasons. The following . . . [are] reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . . or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . [or] has decided an important

In *Dodge*, after conducting a de novo review of the trial court's lengthy *Daubert* procedures, the Tenth Circuit rejected them as a matter of law and remanded 47 cases for complete retrials. App. A at 33a. As three states in the Tenth Circuit – New Mexico, Oklahoma and Wyoming – pointed out in their amicus curiae brief in support of rehearing *en banc*, filed by their Attorneys General, the Tenth Circuit's new hybrid *Daubert* formulation is not only wrong, but also creates chaos at the trial court level, negatively affecting state law enforcement practices and decisions to prosecute.

> This Opinion is . . . of very serious concern for law enforcement officials in both the criminal and civil areas. . . . The panel's proposed standard and lack of guidance on limits to required *Daubert* procedures demanded by defendants will significantly increase the strain on judicial resources . . . [and] work an unfair and prejudicial hardship on governments charged with enforcement of the laws on behalf of all citizens.

Amicus Brief on Behalf of the Attorneys General of the States of New Mexico, Oklahoma, and Wyoming In Support of Appellees' Petition for Rehearing and Petition for Rehearing En Banc, App. C at 42a, 44a.[9]

> question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. R. 10(a), (c).

[9] The *Dodge* panel rejected the Amicus Brief of the Attorneys General in violation of Federal Rule of Appellate Procedure 29, which states:

This hybrid de novo inquiry means that here, for example, the appellate court devotes several pages of its opinion to reviewing the *Daubert* procedures conducted by the *Dodge* trial court and then second-guesses the decisions to have a pretrial hearing without the opposition's expert witnesses testifying live (but allowing declarations and offers of proof) and to limit the size of the briefs and exhibits to the maximum permitted under the local rules. App. A at 19a-30a.

In *Dodge*, the following procedures were undertaken by the lower court: the trial judge, having already presided over another previous set of *Daubert* hearings and a full trial with cross-examinations of the very same experts in *Dodge I*, drew from that background (App. A at 19a-20a, 28a); the trial judge reviewed *Daubert* briefs and appendices (40 pages for each party) and conducted a separate pre-trial hearing based on legal argument from counsel and proffers of expert testimony (App. A at 19a-23a); and the trial judge conducted in camera voir dire, hearing from each expert witness directly and asking its own questions in addition to counsels' examination in order to address "areas of obvious concern." (App. A at 23a-28a).

The trial judge repeatedly acknowledged she was aware of the Tenth Circuit requirements and was fulfilling her

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> The United States or its officer or agency, or *a State*, Territory, Commonwealth, or the District of Columbia *may file an amicus-curiae brief without* the consent of the parties or *leave of court*.

Fed. R. App. P. 29(a)(emphasis added); *see* Tenth Circuit Panel's Order of May 20, 2003, App. D at 48a. Therefore, the full Tenth Circuit was never informed of the serious concerns of New Mexico, Oklahoma and Wyoming.

gatekeeper role under *Daubert* by considering the issues and making specific findings on the record, for example stating:

> In order to try to satisfy the Tenth Circuit test that they indicate the court must make . . . . So according to the direction of the Tenth Circuit, which is that this court should vigilantly make detailed findings to fulfill the gatekeeper role, this court is satisfied that the jury may hear the opinions of [the expert] in this area.

App. A at 28a, 27a.

After reciting these extensive procedures, the Tenth Circuit then concluded de novo that they amount to *no performance of the gatekeeper role at all*, holding that "the district court improperly admitted the expert testimony by failing to perform its gatekeeper obligation." App. A at 31a. Since it is clear from the opinion itself that the trial court did indeed conduct the *Daubert* analysis, the Tenth Circuit de novo review rule for proper *application* of *Daubert* standards is not limited to making sure the trial judge did not abandon the gatekeeping function.

B. All Other Circuits Apply a Straightforward Abuse of Discretion Review

The Tenth Circuit and Seventh Circuits have placed themselves at odds with all other reporting circuits, which have interpreted *Daubert* and its progeny to require giving substantial deference to the trial court's choice of *Daubert*

procedures and limiting review of application and use of the *Daubert* factors to an abuse of discretion standard.[10]

For example, the First Circuit states:

> [T]he circumspect and deferential standard of review applicable to Rule 702 rulings contemplates their affirmance absent manifest trial-court error. . . . "In [determining] . . . relevance, . . . reliability, helpfulness[,] the district court has a comparative advantage over an appeals panel . . . [and] is closer to the case."

Ed Peters Jewelry Co., Inc. v. C & J Jewelry Co., Inc., 124 F.3d 252, 258 (1st Cir. 1997)(citations omitted).[11]

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[10] *See, e.g., U.S. v. Lopez-Lopez*, 282 F.3d 1, 14 (1st Cir. 2002); *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 210 F.3d 1, 15 (1st Cir. 2000); *Campbell ex rel. Campbell v. Metropolitan Prop. & Cas. Ins. Co.*, 239 F.3d 179, 185 (2d Cir. 2001); *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 415 n. 3 (3d Cir. 2002); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 153-54 (3d Cir. 2000); *TFWS, Inc. v. Schaefer*, 325 F.3d 234, 240 (4th Cir. 2003); *U.S. v. Rubio*, 321 F.3d 517, 525 (5th Cir. 2003); *Clay v. Ford Motor Co.*, 215 F.3d 663, 666-67 (6th Cir. 2000); *Kudabeck v. Kroger Co.*, ___ F.3d ____ , 2003 WL 21781920 at *3-*6 (8th Cir. Aug. 4, 2003); *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 928-29 (8th Cir. 2001); *U.S. v. Hankey*, 203 F.3d 1160, 1167-69 (9th Cir. 2000); *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1312 (11th Cir. 2000); *U.S. v. Williams*, 212 F.3d 1305, 1308 (D.C. Cir. 2000).

[11] The Tenth Circuit, in its criticism of the district court's *Daubert* analysis, reveals that it actually misunderstood the experts' methodology and the trial court's factual findings in the record below. The opinion incorrectly states that the district court gave no

And the Fifth Circuit holds:

> District courts enjoy wide latitude in determining the admissibility of expert testimony, and "the discretion of the trial judge and his or her decision will not be disturbed on appeal unless 'manifestly erroneous'."

Watkins v. Telsmith Inc., 121 F.3d 984, 988 (5th Cir. 1997); *see also* Fed. R. Evid. 702, Advisory Committee Notes on 2000 Amendments ("The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony.").

The Ninth Circuit has rejected a categorical requirement that *any* separate pretrial hearing be held in order to satisfy the gatekeeper role, and held that a trial court's decision to not hold a separate hearing cannot constitute an abuse of discretion.

> Nowhere in *Daubert*, *Joiner*, or *Kumho Tire* does the Supreme Court mandate the form that the inquiry into relevance and reliability must take, nor have we previously spoken to this issue. Although the Court stated that the inquiry is a "preliminary" one, to be made "at the outset," *Daubert*, 509 U.S. at 592, 113 S.Ct. 2786, this does not mean that it must be made in

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explanation for accepting Plaintiffs' geologist's baseline numbers, *immediately after* quoting the court's findings which *specifically reference the local baselines* the geologist used for comparison. App. A at 24a-25a. It is very difficult for the appellate court to even try to conduct a "de novo" review of detailed, complex lengthy expert hearings, testimony and briefs, without benefit of the live witnesses and counsels' input. Practically, this is not a suitable job for the appellate court, as the other circuits recognize.

> a separate, pretrial hearing, outside the presence of the jury. Indeed, *Kumho Tire* belies any such interpretation.

U.S. v. Alatorre, 222 F.3d 1098, 1102 (9th Cir. 2000)(footnote omitted); *see also U.S. v. Yousef*, 327 F.3d 56, 148 (2d Cir. 2003); *Nelson v. Tennessee Gas Pipeline Co.*, 243 F.3d 244, 249 (6th Cir. 2001)(hearing not required, especially where record was extensive and *Daubert* issue was fully briefed by the parties); *U.S. v. Evans*, 272 F.3d 1069, 1094 (8th Cir. 2001); *Oddi*, 234 F.3d at 154 (rejecting argument that in limine *Daubert* hearing was required when court had reviewed record including two depositions, a declaration and an expert report).

The other circuits hold that trial courts' decisions to limit length of briefs and exhibits submitted or otherwise enforce their own local rules, even to excuse violations of their local rules, are well within the discretion allowed them under *Daubert*, *Joiner* and *Kumho Tire*. *See, e.g.*, *Genentech, Inc. v. Amgen, Inc.*, 289 F.3d 761, 768 (Fed. Cir. 2002); *Little v. Cox's Supermarkets*, 71 F.3d 637, 641 (7th Cir. 1995); *Davidson & Schaaff, Inc. v. Liberty Nat. Fire Ins. Co.*, 69 F.3d 868, 871 (8th Cir. 1995); *Toombs v. Leone*, 777 F.2d 465, 471 (9th Cir. 1985).

Other circuits have also rejected the Tenth Circuit's stringent requirement of detailed record findings as set out in *Dodge* and *Goebel*, and certainly none require record findings more "specific" and "detailed" than those made by the trial court here in *Dodge*. For instance, the First Circuit has stated:

> We think *Daubert* and Rule 104(a) place some burden on the district court judge to make preliminary

> evaluations with respect to the reliability of evidence, but we decline to "shackle the district court with a mandatory and explicit" reliability analysis. Rather, we assume that the district court performs such an analysis *sub silentio* throughout the trial with respect to all expert testimony.

Hoult v. Hoult, 57 F.3d 1, 5 (1st Cir. 1995), *citing U.S. v. Locascio*, 6 F.3d 924, 938-39 (2d Cir. 1993)("The district judge, who has the ideal vantage point to evaluate an expert's testimony during trial, already has the authority under Fed.R.Evid. 403 to conduct an explicit trustworthiness analysis should she deem one necessary. . . . We will not, however, circumscribe this discretion by burdening the court with the necessity of making an explicit determination for all expert testimony.").

The Sixth Circuit has held that the trial court did not abdicate its gatekeeping function where it made findings showing it had considered reliability and relevance.

> [W]e cannot say that the district court abused its discretion . . . [and] find no merit to [the] argument that the district court abandoned its *Daubert* gate-keeping function by failing to consider the *Daubert* factors. . . . The court summarized its findings as follows:
>
> > [The expert's] . . . testimony is the product of well-established principles of bookkeeping and accounting . . . . [She] demonstrated an understanding of the rules and regulations. . . . The methods employed . . . in reaching her expert opinion were the application of her

> education, training, knowledge and experience
> . . . .
>
> Given such findings, we are confident that the district court had an adequate basis for concluding [the expert] . . . testimony was both reliable and relevant.

U.S. v. Tarwater, 308 F.3d 494, 513 (6th Cir. 2002).

The district court's on-the-record findings in *Dodge*, as recited in the opinion, are more detailed and consider all the *Tarwater* factors. *See also Clay,* 215 F.3d at 667 (6th Cir. 2000)("Although the district court did not explicitly recite that [the expert's] testimony was relevant and reliable, its rulings indicate that it made that determination."); *White v. Ford Motor Co.*, 312 F.3d 998, 1007 (9th Cir. 2002)(admission was not abuse of discretion where court did not apply *Daubert* per se but did *in fact* perform a gatekeeper analysis).

C. The Issue Presented is a Recurring Question of Significant Practical Importance for the Uniform Administration of Justice in the Federal Courts

Also significant as a policy matter is the fact that while the Tenth Circuit criticized trial level *Daubert* procedures including separate pretrial *Daubert* hearings, separate *Daubert* briefings, in camera hearings of all the challenged experts, and express, on-the-record *Daubert* findings as to admissibility, as *inadequate*, absolutely no guidance was provided as to what methods *would* satisfy the Tenth Circuit. The opinion only states that what was done was not enough. App. A at 29a-30a. Consequently, the *Dodge* rule not only puts the Tenth Circuit in conflict with the other circuits, but also creates an unworkable standard for a federal trial court

attempting to conscientiously perform the gatekeeper role.[12] The trial court can never know how much is enough until it is reversed – not unlike asking how long is a piece of string. Since the *Dodge* cases are extremely high profile and are being watched and reported by the legal and popular press, it is important that the Supreme Court step in and eliminate this rift in the circuits.[13]

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[12] The trial judge who presided over these and the related *Boughton v. Cotter* cases for almost 15 years, Honorable Zita L. Weinshienk, in light of this second appellate reversal, has removed herself from the cases. *See* Order of June 10, 2003, App. I at 75a. The new trial judge assigned to *Dodge v. Cotter*, the Honorable Edward W. Nottingham, issued his first order stating:

> Issuance of the mandate would appear to allow the case to go forward in the court, but it also appears that the time within which plaintiffs might apply for Supreme Court review has not yet expired. Accordingly, to clarify this issue and to elucidate the status of the case, it is ordered that the parties . . . file status reports . . . .

See Order of June 13, 2003, App. J at 78a.

[13] As the State Attorneys General recognize, under the Tenth Circuit rule, there is no way for the trial court or the parties to calculate the potential costs of the litigation, or the time which will be required, or to determine what procedures will pass appellate muster. This is a total breakdown of the system. *See* App. C at 41a-44a. "[W]hile exercising its role as a gate-keeper, a trial court must take care not to transform a *Daubert* hearing into a trial on the merits." *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 250 (5th Cir. 2002).

II. THE TENTH CIRCUIT'S REMEDY OF FULL RETRIAL WHEN ERROR RELATES TO THRESHOLD ISSUES IS WASTEFUL AND CONFLICTS WITH THE APPROACH OF OTHER CIRCUITS

The circuits take different approaches to dealing with a threshold pre-trial question that must be resolved following appeal. The choice is whether to send back for a full retrial or rather to direct the lower court to make further determinations, whether legal or factual, that can then be reviewed by the appellate court (which can then decide if a new trial is required). The Tenth Circuit in *Dodge* determined that it needed more detailed findings from the trial court regarding the decision to admit expert testimony, and so sent back for retrial a total of 47 cases which have already consumed over six months of trial days over the last twelve years. The opinion "decline[s] to entertain . . . a remand to the district court to make specific findings relative to these experts" and cites *Mukhtar v. Cal. State Univ.*, 319 F.3d 1073, 1074 (9th Cir. 2003), *amending* 299 F.3d 1053, 1066 (9th Cir. 2002). App. A at 31a, 32a.

The approach now taken by the Tenth Circuit and the Ninth Circuit in *Mukhtar* conflicts with that of the Second and District of Columbia Circuits and the dissenting opinion signed by eleven judges in the Ninth Circuit in *Mukhtar*. *See, e.g.*, *Fort Knox Music Inc. v. Baptiste*, 203 F.3d 193, 197 (2d Cir. 2000)(where district court's failure to give reason for denying motion to dismiss failed to provide meaningful record for appellate review, case remanded for clarification); *Norinsberg v. U.S. Dept. of Agriculture*, 162 F.3d 1194, 1199 (D.C. Cir. 1998)(on court of appeals review of agency decision, agency failure to enunciate legal standard requires remand so agency can do so).

The issue here is not *Daubert* specific – it is what are the proper procedures for efficient administration of complex litigation that must be coordinated between the trial and appellate courts. The Tenth Circuit's decision to order a complete retrial is wrong and wasteful of "the vast investment of resources in this case by both partes and by the federal judiciary." App. A at 31a.[14] *Mukhtar*'s rationale, adopted by the *Dodge* opinion, is essentially that the appellate court cannot put confidence in the district court to follow the instructions it gives. There is nothing in the opinion to justify mistrust of the trial judge specifically or district court judges generally. Further, fears that the district court will engage in "post-hoc rationalization" of its decision to admit expert testimony are not addressed by the remedy of a new trial. Following the *Dodge* opinion, the district court will make specific record findings on the same experts at a separate hearing with live testimony *before* the new trial is held. As the dissent in *Mukhtar* stated:

> What a panel may *not* do is to reject all the applicable alternatives and reverse a jury decision reached after a lengthy trial, simply because, in its view, the district court failed to explain or state its reasons for its ruling on the *Daubert* issue. Here, the panel did not even deign to inquire whether the testimony was admissible under *Daubert*, and thus the only error it found . . . cannot justify a reversal. Contrary to all of the governing legal principles, the panel here took away a substantial verdict from a prevailing civil rights

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[14] The Tenth Circuit itself states it is reluctant to order new trials here. App. A at 31a. The issue of whether it is appropriate to order a full retrial given the appellate court's demand for further detailed record findings was not briefed or argued by either party.

> litigant without having any idea whether the testimony at issue was admissible under *Daubert* and without even permitting the district court to supply the reasons . . . for its admission.
>
> . . . In cases in which weeks or months (or even nine days) of trial are affected by an implicit evidentiary ruling that may well be correct, there is simply no justification for this court to impose so burdensome a process on the district court and the parties. Especially is this so when well established alternatives exist for reaching the merits of the admissibility issue – procedures that would save everyone involved immeasurable time, effort, and money, and that are necessary if we are to comply with the mandate of the Federal Rules.

Mukhtar, 319 F.3d at 1077-78 (Reinhardt, J., joined by 10 other circuit judges, dissenting from denial of rehearing en banc).

Whatever the appellate court's ruling on the *Daubert* issue here in *Dodge*, there is no reason to retry these cases. If the district court upon remand makes specific findings that the expert's methodology is unacceptable, the cases will not be retried. If the district court makes specific findings that the methodology is acceptable, those findings can be reviewed and passed upon one way or the other by the Tenth Circuit without new trials in 47 cases.[15] There is nothing about this threshold question being determined one way or the other which requires new trials. If there was any error made by the

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[15] 30 experts and 28 lay witnesses were called in *Dodge III*, and the most recent trials lasted approximately two months each.

district court, the proper remedy here was not to order a new round of trials, but to retain jurisdiction of the appeals and remand to the district court for further findings, which the Tenth Circuit can then review and finally, one way or another, bring an end to this litigation.

III. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE APPELLATE COURT HAD JURISDICTION IN *DODGE III*

In *Dodge III*, following a two-month trial, a final judgment was entered upon the jury verdicts on July 6, 2001. App. G, 58a. The judgment included an award of prejudgment interest, but not the specific amounts calculated per the mandatory Colorado statute. On September 10, 2001, the court issued an order denying Cotter's post-trial motions, and time to appeal began to run. On November 20, 2001, the court then issued an Amended Final Judgment including the specific amounts of pre-judgment interest. App. H, 66a. Cotter filed its notice of appeal on December 20, 2001, 101 days afer its tolling motions were denied. *See* App. A at 12a.

Plaintiffs moved to dismiss Cotter's appeal for lack of jurisdiction on the basis that "the July 6 judgment is final and the . . . time to appeal began to run when the district court denied Cotter's motions for JMOL and for a new trial on September 10." App. A at 13a. The Tenth Circuit held this issue until argument on the appeals and ruled that because the July 6 judgment did not set forth the statutorily mandated, specific interest amounts, which were undisputed by Cotter, it was not a "final" judgment and Cotter's time to appeal did not start running until an Amended Judgment, with the exact math filled in, issued months later.

> Here, a final judgment was not entered until November 20, when the district court set forth a sum certain for every part of the award, including prejudgment interest. It is clear that the July 6 directive, although titled a "Judgment," was not a final decision under § 1291 . . . . Prejudgment interest is a portion of the damages and thus is an integral part of the merits decision. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175-76 & n. 3, 109 S.Ct. 987, 103 L.Ed.2d 146 (1989); *Garcia v. Burlington N.R. Co.*, 818 F.2d 713, 721 (10th Cir.1987). Here, the determination of prejudgment interest was pending until November 20, which is the date the decision in this case became final. Accordingly, Cotter's notice of appeal was timely and we therefore have appellate jurisdiction.

App. A at 13a-14a.

The *Osterneck* case holds that when a *discretionary* award of prejudgment interest has not yet been determined, then there is no final judgment. *Osterneck*, 489 U.S. at 176.[16]

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[16] The Court in *Osterneck* indicated in dicta that the reasoning should be the same when mandatory prejudgment interest had neither been requested nor ordered in the first final judgment and the *Garcia* case invalidated a sua sponte order issued after an appeal had been filed, awarding prejudgment interest that had not been previously requested or ordered. In *Dodge*, the mandatory interest had been requested and ordered in the first judgment. (The district court's July 6 Judgment specifically states that mandatory "prejudgment interest shall accrue as provided by law." App. G at 63a.) The rate of interest is fixed by Colorado statute. What occurred later was the ministerial calculation of the specific *amounts* of the prejudgment interest as per the statute.

However, in *Dodge*, pursuant to Colorado law, the award of prejudgment interest is mandatory and did not require the district court to consider any new issues on the merits; it only required calculation of the amount of prejudgment interest based on the rates of interest set forth in the statutes. *See* Colo. Rev. Stat. §§ 13-21-101 and 5-12-102. Plaintiffs had requested prejudgment interest and it was awarded in the final judgment entered on July 6, 2001.

The Fourth and Sixth Circuits have interpreted *Osterneck* to mean that where there is an award of prejudgment interest, a subsequent motion to amend the judgment to add specific amounts is a motion per Fed. R. Civ. P. 60(a) to correct clerical mistakes. A Rule 60(a) motion does not affect the finality of the judgment, so that the time to file an appeal is not extended. *See* Fed. R. App. P. 4(a)(1)(A), 4(a)(4)(A); *Hodge ex rel. Skiff v. Hodge*, 269 F.3d 155, 158 (2d Cir. 2001).

The *Dodge* court's holding and interpretation of *Osterneck* is an improper expansion of jurisdiction which has now brought the Tenth Circuit into conflict with the law of the Fourth and Sixth Circuits regarding the handling of prejudgment interest calculations later added to the judgment. Both these circuits hold that motions to insert a specific dollar amount of the interest are motions pursuant to Fed. R. Civ. P. 60(a), not rule 59(e) motions per *Osterneck*, so are not part of the merits and do not affect the finality of the judgment or toll the time to appeal. *See Pogor v. Makita USA, Inc.*, 135 F.3d 384, 388 (6th Cir. 1998); *Kosnoski v. Howley*, 33 F.3d 376, 379 (4th Cir. 1994).

The Tenth Circuit has departed from the rationale set out by this Court that if the merits are not affected by post-judgment determination of collateral issues, then the original

judgment is a final judgment and the time to appeal runs from that point. *See Osterneck*, 489 U.S. at 175-76; *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-203 (1988)(attorney's fees); *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268-69 (1988)(costs).

A bright line rule is needed in matters of jurisdiction and interpretation of the federal rules governing the time for filing appeals, and the rule must be applied uniformly throughout the circuits. "[T]he taking of an appeal within the prescribed time is mandatory and jurisdictional." *Budinich*, 486 U.S. at 203 (1988). "A court lacks discretion to consider the merits of a case over which it is without jurisdiction." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). This Court should grant certiorari to review the Tenth Circuit's expansion of jurisdiction by accepting the untimely appeal in *Dodge III*.

CONCLUSION

This Court should issue a writ of certiorari to address the splits among the circuits on important issues of recurring procedural law, which are disrupting the orderly and efficient process of complex litigation in the federal courts.

Dated: August 25, 2003

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 01-1197 and 01-1236, Nos. 01-1591 and 02-1008

[Filed April 22, 2003]

JOSEPH DODGE, individually and as personal representative of the Estate of Thelma Dodge; ROCKY MOUNTAIN EQUESTRIAN CENTER INC.; DESIREE CHRYSLER; DANIEL CHRYSLER; AUGUST CHRYSLER; CLAYTON CHRYSLER, minors, by and through their parents and next friends, Desiree Chrysler and Daniel Chrysler; PATRICK SHANE DODGE; CONNIE DODGE; NATHAN DODGE; LESLIE DODGE; BRYAN DODGE; PATRICK DODGE, minors, by and through their parents and next friends, Patrick Shane Dodge and Connie Dodge; YVONNE PEGARARO; NOAH WELCH, a minor by and through his mother and next friend Yvonne Pegararo; JEREMIAH WELCH; RHONDA BUTSON; DANIEL SLANOVICH; GUS SLANOVICH; CHANDLER CREEK COMPANIES; DONALD LUNA; SONJA LUNA; BRETT LUNA; NORMAN PLATT, individually and as personal representative of the Estate of Dorothy Platt; JAMES L. TREAT; ASPEN TRUST; BRUCE HADLEY; VIRGINIA HADLEY; JACK HADLEY; SHAYLEE HADLEY; KIM MYERS,

SID MYERS; CASEY MYERS; CHAD MYERS; TRISTAN DODGE; SHAYLEE DODGE; DOLENE BLUE, individually and as personal representative of the Estate of James Blue,

Plaintiffs-Appellees,

and [Nos. 01-1197 and 01-1236]

RUSSELL JEWETT; BONITA JEWETT; NARD CLAAR; SARA CLAAR; MIKE HADLEY; CATHERINE HADLEY; LINDA JOHNSON; ALICIA JOHNSON; BLAINE JOHNSON, a minor by and through his mother and next friend Linda Johnson; JULIE ANN WRIGHT; JENNIFER WRIGHT; NICOLE WRIGHT, a minor by and through her mother Julie Ann Wright; CANON FARMS TRUST,

Plaintiffs-Appellees/Cross-Appellants,

v.

COTTER CORPORATION,

Defendant-Appellant/Cross-Appellee.

JOSEPH DODGE, individually and as personal representative of the Estate of Thelma Dodge; DESIREE CHRYSLER; DANIEL CHRYSLER; AUGUST CHRYSLER; CLAYTON CHRYSLER, minors, by and through their parents and next friends, Desiree Chrysler and Daniel Chrysler; PATRICK SHANE DODGE; CONNIE DODGE;

NATHAN DODGE; LESLIE DODGE; BRYAN DODGE; PATRICK DODGE, minors, by and through their parents and next friends, Patrick Shane Dodge and Connie Dodge; YVONNE PEGARARO; NOAH WELCH, a minor by and through his mother and next friend Yvonne Pegararo; JEREMIAH WELCH; RHONDA BUTSON; DANIEL SLANOVICH; GUS SLANOVICH; DONALD LUNA; SONJA LUNA; BRETT LUNA; NORMAN PLATT, individually and as personal representative of the Estate of Dorothy Platt; JAMES L. TREAT; ASPEN TRUST; BRUCE HADLEY; VIRGINIA HADLEY; JACK HADLEY; KIM MYERS; SID MYERS; CASEY MYERS; CHAD MYERS; TRISTAN DODGE; SHAYLEE DODGE; DOLENE BLUE, individually and as personal representative of the Estate of James Blue; SHAYLEE HADLEY,

Plaintiffs-Appellees/Cross-Appellants,

and [Nos. 01-1591 and 01-1008]

ROCKY MOUNTAIN EQUESTRIAN CENTER INC.; CHANDLER CREEK COMPANIES; RUSSELL JEWETT; BONITA JEWETT; NARD CLAAR; SARA CLAAR; MIKE HADLEY; LINDA JOHNSON; SHIRLEY LUNA; ALICIA JOHNSON; CRYSTAL DAWN THREET; BLAINE JOHNSON, a minor by and through his mother and next friend Linda Johnson; JAMES BLUE; JULIE ANN WRIGHT; DOROTHY PLATT; JENNIFER WRIGHT; SHIRLEY BICKETT; JOHN BICKETT; NICOLE WRIGHT, a minor by and through her mother Julie Ann Wright; RICHARD JANITELL; CANON FARMS TRUST; JOHN PINELL; EMMA

PINELL; THELMA DODGE; EDNA BLUE; RALPH JANITELL; KATHERINE HADLEY; RUTH QUICK JOHNSON,

Plaintiffs-Appellees,

v.

COTTER CORPORATION,

Defendant-Appellant/Cross-Appellee.

Appeals from the United States District Court
for the District of Colorado
(D.C. No. 91-Z-1861)

COUNSEL: William A. VonHoene, Exelon Business Services Company, Chicago, Illinois (John L. Watson, Esq., Paul F. Lewis, Esq., Jerry N. Jones, Esq., Rebecca L. Crotty, Esq., Dianne M. Kueck, Esq., of Moye, Giles, O'Keefe, Vermeire & Gorrell LLP, Denver, Colorado, Barry Levenstam, Esq., Jenner & Block, LLC, Chicago, Illinois, on the briefs), for Defendant-Appellant/Cross-Appellee.

Don Howarth, Esq. (Suzelle M. Smith, Esq., Irene Viksman Flores, Esq., Darcy R. Harris, Esq., of Howarth & Smith, Los Angeles, California, with him on the brief), for Plaintiffs-Appellees/Cross-Appellants.

JUDGES: Before KELLY and O'BRIEN, Circuit Judges, and EAGAN*, District Judge.

OPINION

KELLY, Circuit Judge.

I. Factual Background

This appeal represents our fourth review of the contentious litigation springing from a uranium mill operated in south-central Colorado by the Cotter Corporation ("Cotter"). In light of our previous discussion of the background of these actions in *Dodge v. Cotter Corp.*, 203 F.3d 1190 (10th Cir. 2000) ("*Dodge I*"), we present only the following factual summary.

Cotter's uranium mill ("the Mill"), which occupies a several hundred acre site in south-central Colorado, two and a half miles south of Canon City, began operation in 1958. The Mill was operated for the extraction and concentration of uranium oxide from ore using both alkaline and acid leach processes that resulted in two types of waste: tailings, solid dust-like particles of ore, and raffinate, liquid recovered from the uranium extraction solutions. In accordance with the state of the art at the time, these wastes were originally deposited in a series of unlined ponds.

Lincoln Park, an unincorporated area, is a mile and a half north of the Mill. The Arkansas River borders Lincoln Park's northern rim while Sand Creek and the DeWeese Dye Ditch

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* The Honorable Claire V. Eagan, United States District Judge for the Northern District of Oklahoma, sitting by designation.

angle across its southern perimeters. During the Mill's years of operation crushing ore into "yellowcake," a form of concentrated uranium, dry tailings were carried off-site by winds and raffinate leached into groundwater beneath the Mill and flowed north toward Lincoln Park along the Sand Creek channel.

The Atomic Energy Commission ("AEC") regulated the Mill from 1958 to 1968. During this period of AEC regulatory oversight, the AEC cited Cotter for various violations of the conditions of its license at the Mill. The State of Colorado Department of Health ("the State") took over responsibility from the AEC for licensing radioactive materials in 1968 and thus assumed regulatory oversight of the Mill at that time. Cotter continued to receive a variety of citations from the State for violating the conditions of its license. The presence of off-site contamination was identified as early as 1968. Over time, as awareness of further contamination grew, so too did the State's concern about mitigating the problem.

In an effort to clean up the site, both the Environmental Protection Agency and the Colorado Department of Public Health and Environment ("the Department") targeted the Mill's unlined storage ponds as a primary source of the proliferation of such hazardous substances as uranium, molybdenum, thorium, radium, selenium, arsenic, and lead. By 1981, Cotter had closed eight unlined ponds and constructed two new tailings facilities sealed with a synthetic membrane liner and significant barriers of compacted clay. Later, Cotter added a clay barrier to the Sand Creek Dam to prevent water flow from the Mill into Lincoln Park. Despite these and various other efforts, state inspections would reveal

tears in the ponds' linings and violations of air emissions standards.

II. Procedural Background

In 1983, the State of Colorado sued Cotter in federal court for damages to natural resources and clean-up of the contamination. *State of Colorado v. Cotter Corp.*, Case. No. 83-C-2389. In 1988, the parties settled the matter by a Consent Decree which provided a Remedial Action Plan ("the Plan"). The Plan required the creation of the Human Health Risk Assessment Panel ("the Panel") which prepared a report in 1991 on the Lincoln Park Superfund Site evaluating the health risks to the surrounding populations from the Mill's off-site releases. The Panel quantified exposures to Mill-related substances in air, surface water, sediment, ground water, soil, and different types of locally raised food, measured the toxicity of the exposures, and assessed the possible health risks based on those evaluations. The Panel concluded "risks to humans were generally low, especially when judged in comparison to natural 'background' levels of mill-related metals in the environment." Aplt. App. at 027896. However, the Panel excepted from that conclusion a possible health concern in drinking ground water "because of the presence of molybdenum (and, to a lesser extent, uranium) in the water." *Id.*

A. The Boughton Trial and Dodge I

In 1991, a multitude of Lincoln Park residents filed an action under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § § 9601-9675, the Price-Anderson Act, 42 U.S.C. §

2210(n)(2), and Colorado law alleging that Cotter's negligent handling, maintenance, transportation and storage of hazardous materials used or produced at the Mill caused damage to their health and property. Residents who could not claim direct physical injury as a result of exposure sought instead to recover for the expense of medical monitoring that they claimed was necessitated by their increased health risks caused by the exposure.

After class certification was denied, representative plaintiffs selected for the first trial ("the Boughton group") convinced a jury that Cotter was negligent in operating the Mill but failed to establish that their alleged exposure to hazardous materials required future medical monitoring. The Boughton plaintiffs' appeal of the denial of class certification and other issues was rejected. *See Boughton v. Cotter Corp.*, 65 F.3d 823 (10th Cir. 1995). In 1998, a second group of plaintiffs ("the Dodge group") brought their claims to trial, hoping to make use of the finding of negligence from the Boughton trial. After the district court ruled that it would allow the offensive use of collateral estoppel of the Boughton jury's finding of negligence, the Dodge group plaintiffs successfully established causation of their physical injuries and were awarded monetary damages by a jury. However, after we concluded in February 2000 that the district court incorrectly applied the doctrine of offensive collateral estoppel, we reversed and remanded to the district court for retrial. *Dodge I*, 203 F.3d at 1193.

B. Dodge II

The jury trial for the next group of plaintiffs ("the Jewett group") occurred in October 2000. The district court denied

Cotter's motion to exclude several of the Jewett group plaintiffs' experts on the grounds that the testimony was unreliable and inadmissible under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469, 113 S. Ct. 2786 (1993). Because the Jewett group jury found that Cotter was negligent but had not caused any of the plaintiffs' alleged physical injuries or illnesses, the court entered judgment for Cotter on the negligence claims. However, the Jewett group jury did return verdicts in favor of ten plaintiffs for medical monitoring and in favor of eleven plaintiffs on their trespass claims. Although the jury made no finding regarding medical monitoring for two of the plaintiffs, the district court entered judgment totaling $ 241,300 for medical monitoring for all of the Jewett group plaintiffs. The jury also awarded a total of $ 42,501 among the plaintiffs on their trespass claims. With interest, the total award was approximately $ 300,000.

In No. 01-1197, Cotter appeals the Jewett group judgment, arguing that: (1) the district court failed to perform its gatekeeper function as required by *Daubert* and erred by admitting the testimony of certain plaintiffs' experts; (2) even if the expert testimony is admissible, the evidence was legally insufficient to send the negligence claim to the jury because plaintiffs failed to demonstrate either a breach or causation; (3) plaintiffs failed to introduce relevant evidence of trespass damages and the evidence is insufficient to support the trespass verdicts; and (4) the medical monitoring judgments must be reversed under Colorado law and in the absence of a supportable finding of negligent conduct. In No. 01-1236, the plaintiffs cross-appeal the Jewett group verdict on the basis that the district court erred in denying lump sum damages and in its imposition of a medical monitoring trust. The appeals

represented by Nos. 01-1197 and 01-1236 are referred to herein as *Dodge II*.

C. Dodge III

Following the Jewett trial, the district court consolidated all remaining Dodge plaintiffs, including the remanded plaintiffs from *Dodge I*, into one large plaintiff group ("the Blue group"). The Blue group plaintiffs moved the district court to allow the use of offensive collateral estoppel of the negligent conduct issue decided in the *Dodge II* trial. As in *Dodge I*, the district court granted the Blue group's motion and barred Cotter from contesting its negligence vis-a-vis the Blue group plaintiffs. The Blue group plaintiffs offered expert witness testimony; all but one of these experts were the same as those used in the *Dodge II* trial. Cotter's motion for summary judgment on the basis that plaintiffs could not satisfy their burden of demonstrating required levels of exposure to hazardous substances was denied, as was Cotter's motion to exclude expert testimony pursuant to *Daubert*.

In 2001, the Blue group jury returned verdicts for all but one plaintiff. In particular, this jury found that Cotter was a cause of unspecified injuries and/or illnesses to plaintiffs. Accordingly, the district court entered judgments in favor of 20 plaintiffs for negligence for a total award of over $ 12.5 million, in favor of 13 plaintiffs for trespass for a total award of over $ 1.5 million, and in favor of 27 plaintiffs for negligence requiring medical monitoring. The jury also awarded over $ 2.2 million in punitive damages to 26 plaintiffs. With costs and interest, the total award from the Blue trial exceeds $ 43 million. Aplt. App. at 017397-403.

In No. 01-1591, Cotter appeals the Blue group judgment, arguing that: (1) the district court erred by allowing the use of offensive collateral estoppel on the negligence issue; (2) the district court erred by admitting the testimony of certain plaintiffs' experts; (3) even if the expert testimony is admissible, the evidence was legally insufficient to send the negligence claim to the jury because plaintiffs failed to demonstrate causation; (4) the medical monitoring judgments must be reversed under Colorado law and in the absence of a supportable finding of negligence; (5) plaintiffs failed to introduce relevant evidence of trespass damages and that the evidence is insufficient to support the trespass verdicts; (6) the district court erred by allowing plaintiffs' biographical profiles into evidence; and (7) the district court erred by refusing to admit certain exhibits. In No. 02-1008, the plaintiffs cross-appeal the Blue group verdict on the basis that the district court erred in denying lump sum damages as to medical monitoring. The appeals represented by Nos. 01-1591 and 02-1008 are referred to herein as *Dodge III*. The plaintiffs in *Dodge III* have also moved this court to dismiss Cotter's appeal for lack of appellate jurisdiction, claiming that Cotter filed an untimely notice of appeal in No. 01-1591.

Discussion

I. Appellate Jurisdiction - Timeliness of the Notice of Appeal

Because the filing of a timely notice of appeal is mandatory and jurisdictional, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203, 100 L. Ed. 2d 178, 108 S. Ct. 1717 (1988), we turn first to the *Dodge III* plaintiffs' motion to dismiss Cotter's appeal (No. 01-1591) for lack of appellate jurisdiction based on Cotter's alleged failure to file a timely

notice of appeal. After the *Dodge III* jury verdicts were returned on June 28, 2001, Aplt. App. at 017265-389, the district court entered a "Judgment" on July 6 in favor of plaintiffs. *Id.* at 017391-395. The July 6 judgment awarded costs, prejudgment interest, and medical monitoring without specifying precise numerical amounts for these awards. In the judgment, the court informed the parties that they "may file declarations on the issue of medical monitoring within 30 days." *Id.* at 017394.

On July 16, Cotter filed a renewed motion for judgment as a matter of law ("JMOL") and a motion for a new trial. *Id.* at 027441-464. On July 19, some plaintiffs filed a motion to amend the judgment to include prejudgment interest. Declaration of Don Howarth in Support of Plaintiffs' Motion to Dismiss, filed Dec. 28, 2001, Ex. C. On August 6, both parties filed pleadings pertaining to the matter of medical monitoring. On September 10, the district court entered an order denying Cotter's motions for JMOL and for a new trial. Aplt. App. at 027494-496. Also on September 10, the court entered an order calculating amounts to be awarded for costs and for medical monitoring. *Id.* at 027498-503. This order also declared that because the "only remaining issue before the Court concerns interest," it would "amend the judgment to reflect the award of costs and medical monitoring once the parties have submitted their calculations concerning interest on the personal injury and trespass awards." *Id.* at 027502.

The district court entered its amended final judgment on November 20. *Id.* at 017397-405. This judgment set forth the certain sums awarded for medical monitoring, prejudgment interest and costs. Cotter filed its notice of appeal (No. 01-1591) on December 20, and the plaintiffs cross-appealed (No.

02-1008) on January 3, 2002. The plaintiffs argue that the July 6 judgment is final and that the time to appeal began to run when the district court denied Cotter's motions for JMOL and for a new trial on September 10. Plaintiffs' Motion to Dismiss, filed Dec. 28, 2001, at 5-6.

We have "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291. Under § *1291*, we have jurisdiction only over a "final" decision of a district court--that is, a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233, 89 L. Ed. 911, 65 S. Ct. 631 (1945); *Albright v. UNUM Life Ins. Co.*, 59 F.3d 1089, 1092 (10th Cir. 1995). In other words, to be final, a decision must reflect "the termination of all matters as to all parties and causes of action." *D&H Marketers, Inc. v. Freedom Oil & Gas, Inc.*, 744 F.2d 1443, 1444 (10th Cir. 1984) (en banc). "The touchstone of a final order is 'a decision by the court that a party shall recover only a *sum certain*.'" *Albright*, 59 F.3d at 1092 (quoting former Fed. R. Civ. P. 58). Finally, in considering whether a judgment is "final" under § 1291, the "label used to describe the judicial demand is not controlling," meaning we "analyze the substance of the district court's decision, not its label or form." *Id.*

Applying these principles, we conclude that plaintiffs' argument is without merit and we deny the motion to dismiss. Here, a final judgment was not entered until November 20, when the district court set forth a sum certain for every part of the award, including prejudgment interest. It is clear that the July 6 directive, although titled a "Judgment," was not a final decision under § 1291 because neither the medical

monitoring award nor the prejudgment interest were finally determined. Prejudgment interest is a portion of the damages and thus is an integral part of the merits decision. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175-76, 103 L. Ed. 2d 146, 109 S. Ct. 987 & n.3, 489 U.S. 169, 103 L. Ed. 2d 146, 109 S. Ct. 987 (1989); *Garcia v. Burlington N. R. Co.*, 818 F.2d 713, 721 (10th Cir. 1987). Here, the determination of prejudgment interest was pending until November 20, which is the date the decision in this case became final. Accordingly, Cotter's notice of appeal was timely and we therefore have appellate jurisdiction. Cotter's related motion to strike and its related motion for sanctions and costs are denied.

II. *Dodge II* - Admissibility of Expert Testimony

In *Dodge II*, Cotter raises two issues regarding the admissibility of plaintiffs' experts. First, Cotter argues that the district court failed to perform the gatekeeper function mandated by *Daubert* by focusing its findings entirely on certain experts' professional qualifications and failing to make specific findings relating to the reliability of their opinions. Second, Cotter argues that had the district court performed its gatekeeper function, it would have excluded as unreliable the testimony of certain plaintiffs' experts, including geologist Glen Miller and medical experts Dr. Malin Dollinger and Dr. Martyn Smith. *Dodge II* Aplt. Br. at 22. Cotter does not challenge the experts' credentials, expertise or qualifications to testify as experts in their respective areas of concern.

It is by now well established that Fed. R. Evid. 702 imposes on a district court a gatekeeper obligation to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589.

This gatekeeper function requires the judge to assess the reasoning and methodology underlying the expert's opinion, and determine whether it is both scientifically valid and applicable to a particular set of facts. *Id.* at 592-93. The Supreme Court has made clear that "where [expert] testimony's factual basis, data, principles, methods, or their application are called sufficiently into question . . . the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.'" *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999) (quoting *Daubert*, 509 U.S. at 592).

To be reliable under *Daubert*, an expert's scientific testimony must be based on scientific knowledge, which "implies a grounding in the methods and procedures of science" based on actual knowledge, not "subjective belief or unsupported speculation." 509 U.S. at 590. In other words, "an inference or assertion must be derived by the scientific method . . . [and] must be supported by appropriate validation--*i.e.* 'good grounds,' based on what is known." *Id.* While expert opinions "must be based on facts which enable [the expert] to express a reasonably accurate conclusion as opposed to conjecture or speculation, . . . absolute certainty is not required." *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1519 (10th Cir. 1995) (quotation omitted). "The plaintiff need not prove that the expert is undisputably correct or that the expert's theory is 'generally accepted' in the scientific community." *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999). Instead, the plaintiff must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which satisfy Rule 702's reliability requirements. *Id.*

To assist in the assessment of reliability, the Supreme Court in *Daubert* listed four nonexclusive factors that the trial court may consider: (1) whether the opinion at issue is susceptible to testing and has been subjected to such testing; (2) whether the opinion has been subjected to peer review; (3) whether there is a known or potential rate of error associated with the methodology used and whether there are standards controlling the technique's operation; and (4) whether the theory has been accepted in the scientific community. 509 U.S. at 593-94. As noted, the list is not exclusive, and district courts applying *Daubert* have broad discretion to consider a variety of other factors. *Kumho Tire, 526 U.S at 150* ("We can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert* . . . . Too much depends upon the particular circumstances of the particular case at issue.").

Generally, the district court should focus on an expert's methodology rather than the conclusions it generates. *Daubert*, 509 U.S. at 595. However, an expert's conclusions are not immune from scrutiny: "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997) ("Nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert."). Under *Daubert*, "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology." *Mitchell*, 165 F.3d at 782 (quoting *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir. 1994)). It is critical that

the district court determine "whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." *Id.* at 783 (quoting *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7th Cir. 1996)). Regardless of the specific factors at issue, the purpose of the *Daubert* inquiry is always "to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire*, 526 U.S. at 152.

A. Standard of Review

We review de novo the question of whether the district court applied the proper legal test in admitting an expert's testimony. *Goebel v. Denver & Rio Grande W. R.R.* Co., 215 F.3d 1083, 1087 (10th Cir. 2000). Though the district court has discretion in *how* it conducts the gatekeeper function, we have recognized that it has no discretion to avoid performing the gatekeeper function. *Id.* (citing *Kumho Tire*, 526 U.S. at 158-59 (Scalia, J., concurring)). Therefore, we review de novo the question of whether the district court applied the proper standard and actually performed its gatekeeper role in the first instance. We then review the trial court's actual application of the standard in deciding whether to admit or exclude an expert's testimony for abuse of discretion. *Joiner*, 522 U.S. at 139. The trial court's broad discretion applies both in deciding how to assess an expert's reliability, including what procedures to utilize in making that assessment, as well as in making the ultimate determination of reliability. *Kumho Tire*, 526 U.S. at 152; *United States v. Velarde*, 214 F.3d 1204, 1208-09 (10th Cir. 2000).

Accordingly, we will not disturb the district court's ruling unless it is "arbitrary, capricious, whimsical or manifestly unreasonable" or when we are convinced that the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Atlantic Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1163-64 (10th Cir. 2000).

A natural requirement of the gatekeeper function is the creation of "a sufficiently developed record in order to allow a determination of whether the district court properly applied the relevant law." *Goebel*, 215 F.3d at 1087; *see also Dodge I*, 203 F.3d at 1200 n.12 (urging the district court on remand to "vigilantly make detailed findings to fulfill the gatekeeper role crafted in *Daubert*" to ensure that each "particular opinion is based on valid reasoning and reliable methodology"). In *Velarde*, we observed that "*Kumho* and *Daubert* make it clear that the [district] court must, on the record, make *some* kind of reliability determination." 214 F.3d at 1209. Thus, we held in *Goebel* that when faced with a party's objection, a district court "must adequately demonstrate by *specific findings on the record* that it has performed its duty as gatekeeper." 215 F.3d at 1088 (emphasis added). "Without specific findings or discussion on the record, it is impossible on appeal to determine whether the district court carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to admit the expert testimony." *Id.* (quotations omitted). "In the absence of such findings, we must conclude that the court abused its discretion in admitting such testimony." *Id.*

B. Background of Daubert Issues

(1) Cotter's *Daubert* Motions

Before trial, Cotter moved to exclude the testimony of certain plaintiffs' experts on the grounds that the opinions were not reliable under *Daubert*. Aplt. App. at 002034-101. The 47-page motion included an appendix of several thousand pages containing Fed. R. Civ. P. 26 reports from both parties' experts, deposition testimony, and over 200 articles and studies relied upon by the experts. *Id.* at 002103-009852. Concluding that the motion violated local court rules regarding length, the district court returned the motion and accompanying appendix and allowed Cotter to file a revised motion and appendix, neither of which could exceed 20 pages in length. *Id.* at 009857-858. Cotter moved for leave to submit a lengthier appendix to provide the court with sufficient information to make its ultimate determination, *id.* at 009860-862, but the district court denied the motion, finding that "such material is prolix" because the 20-page limit is "sufficient to allow [Cotter] to allege that plaintiffs' experts are not, in fact, experts, or that they base their opinions on unreliable studies or methodologies." *Id.* at 009865. Cotter then submitted a revised motion and appendix complying with the limits in which Cotter objected to the reliability of six of the plaintiffs' proposed expert witnesses. *Id.* at 009868-908.

The district court recognized the necessity of conducting a *Daubert* hearing to address several important issues raised in the motions. *Id.* at 010114. At a trial preparation conference, the court informed the parties that its *Daubert* rulings "are going to be very similar, if not the same, as [its]

rulings were [in *Dodge I*] . . . except in the areas where the Court of Appeals [found] error." *Id.* The district court also informed the parties that while it wished to conduct the *Daubert* hearing without live witness testimony by relying on argument and proffers, it would consider allowing live witnesses if absolutely necessary. *Id.* at 010166. Plaintiffs submitted several proffers in opposition to Cotter's *Daubert* motion including summaries of their challenged experts' opinions, bases, methods and conclusions. *Id.* at 010191-271, 299-307. Cotter also submitted exhibits including expert affidavits, deposition testimony, articles, studies and proffers related to the contested experts. *Id.* at 010330-696.

(2) The *Daubert* Hearing - Summary of Cotter's Arguments

At the *Daubert* hearing, Cotter stated its intention to introduce live testimony from three of its experts. *Id.* at 010700. Citing Cotter's failure to notify the court of this intention in a timely manner, the court refused to allow any live witness testimony. *Id.* at 010704. Thus, relying solely on evidentiary proffers, each party argued its position on the admissibility of certain expert testimony. *Id.* at 010698-843. Three experts in particular were the focus of Cotter's argument. The first was geologist Glen Miller, whose expert testimony would be offered to establish the presence of harmful substances (i.e., uranium, molybdenum, arsenic, lead) in levels exceeding the natural background in soil, water and vegetation samples taken in and around plaintiffs' properties and also to establish that such substances derived from the Mill. *Id.* at 010755-782. The remaining two were Dr. Malin Dollinger, a medical doctor board certified in internal medicine and oncology, and Martyn Smith, Ph.D., a professor of toxicology; the testimony from these experts

would be offered to establish that the harmful substances released from the Mill were a cause of plaintiffs' extensive range of maladies. *Id.* at 010706-726.

Briefly summarized, Cotter argued that Mr. Miller's testimony was unreliable due to his use of unreliable methodologies, specifically the method and reasoning he employed in selecting baselines with which to compare the measured levels of the substances at issue. Because each of these substances are naturally found in the environment, and because the vicinity of the Mill was known to be mineral rich and geologically varied, Cotter argued that the selection of valid baselines was nothing short of fundamental to determining if Cotter was in fact responsible for the measured levels of the substances on plaintiffs' properties. Cotter took particular issue with Mr. Miller's use of baselines from a textbook published in 1966, referred to by the author's name, "Bowen," which established worldwide average baselines of various substances. Although Mr. Miller maintained that no superior source of pre-Mill-contamination baselines were available, Cotter argued, among other things, that use of Bowen's worldwide baselines, as opposed to baselines more directly tied to the specific mineral-rich vicinity of the Mill, rendered Mr. Miller's entire analysis unreliable. *Id.* at 010755-782.

Cotter also argued that the causation testimony from Drs. Dollinger and Smith was unreliable due to their reliance on improper methodology and reasoning to conclude that substances from Cotter caused the plaintiffs' maladies. Specifically, Cotter took issue with: (1) their reliance on Mr. Miller's testimony to conclude that plaintiffs were significantly exposed without any real understanding or

estimate of dose or exposure amounts; (2) their conclusion without proper scientific support that the substances at issue could even cause health problems in humans like those alleged by plaintiffs; and (3) the reasoning that because nothing else seemed to account for the plaintiffs' alleged maladies, contamination from Cotter must have been the cause.

The district court recognized that several of Cotter's arguments merited close attention. *Id.* at 010839-840. The court specifically expressed concern with various aspects of the proposed expert testimony, including Mr. Miller's baselines for dust, vegetation and water. *Id.* at 010786, 010770-771, 010792-795, 010801, 010804, 010809-811. In fact, the court had the following to say regarding perceived problems with Mr. Miller's testimony:

> Let me just be very candid with you. I wish that the plaintiffs had some better information on background. I think it would be much better if they had; if they had even gone out and done some tests in the surrounding areas, rather than rely on Bowen. What is the level in Europe or Israel or South Africa, it seems to me is not that critical.
>
> Unfortunately, they didn't. Now, if I don't give Mr. Miller a chance to show that this background is sufficient, basically the whole plaintiffs' case goes and we might as well just strike the trial. And I frankly don't want to do that. I think the plaintiffs should have some opportunity to present their case to the jury.

Id. at 010817. Recognizing the need to hear from the experts themselves, the court opted to reserve ruling on each expert

until trial, at which time the court would allow in camera voir dire of each contested expert. *Id.* at 010839-840. As a result, at the *Daubert* hearing, the court made no specific findings on the record concerning the reliability of the experts' testimony. *Id.* at 010840. The court concluded the hearing by denying Cotter's request to proffer a complete appendix of the reports and studies relied upon by the contested experts, stating that it would ask for any additional materials if it needed them. *Id.* at 010842.

C. Review of the District Court's Rulings Following In Camera Voir Dire

Upon reviewing the record, we reluctantly conclude that the district court did not perform its gatekeeper function with respect to plaintiffs' experts Mr. Miller, Dr. Dollinger and Dr. Smith and thereby abused its discretion by admitting their testimony. Faced with an exceedingly difficult, complex case and obvious docket pressures, the court did not make adequate findings on the record to assure that the expert testimony offered was both relevant and reliable, and that the particular opinions were based on valid reasoning and reliable methodology.

As is true in most any toxic tort action, the outcome of this case indisputably hinges on the testimony of experts. Recognizing this fact, in reversing and remanding *Dodge I*, we specifically alerted the district court to the fundamental importance of properly performing the gatekeeper function:

> Because the question of expert testimony is likely to recur, we would be remiss not to indicate our concern that the district court vigilantly make *detailed* findings

> to fulfill the gatekeeper role crafted in *Daubert* . . . . Given the novelty of the medical causation theory here linking exposure to molybdenum with osteoarthritis and bony exostoses, it is essential that by *specific* findings of record the trial court assures the expert testimony offered by both sides is relevant and reliable, and the particular opinion is based on valid reasoning and reliable methodology.

203 F.3d at 1200 n.12 (quotations omitted) (emphasis added). At the *Daubert* hearing itself, the district court made no specific, detailed findings on the record concerning any of the experts' testimony. Therefore, unless the court made such findings at trial during the in camera voir dire of Mr. Miller, Dr. Dollinger, and Dr. Smith, it necessarily failed to perform the gatekeeper function with respect to those experts.

Regarding Mr. Miller, after a brief in camera voir dire by the parties, the court made the following findings, which we include in their entirety:

> There certainly are problems here, a lot of problems, concerning water, concerning vegetation, and the differences. But what I have heard is that Mr. Miller is certainly a well-qualified geologist, got his degree in Wyoming, has a great deal of experience.
>
> He wishes to use Bowen, which is a source or a treatise widely accepted by state agencies. He also has looked at the Southfield Mine and the values there. He has looked at many other sources, baselines and GeoTrans, and the USGS figures.

> I think that the problems that exist with differences can be covered by cross-examination. And with one exception, I'm going to permit him to testify. I'd like to hear what he says. I'd like to hear the direct and cross. If there are any huge problems, I'd like to hear a *Rule 50* motion at the end of the case.
>
> But the one problem I have is the dust. There apparently is no baseline for dust. It's not in Bowen, and the Court feels that it's just speculation to let this witness testify about dust. And he may not testify concerning dust.
>
> As far as the water, vegetation, soil, et cetera, I think that can be covered on cross-examination.

Aplt. App. at 012035-036. These findings lack the degree of specificity that would allow us to determine whether the district court properly applied the relevant law. Not only is no mention made about Mr. Miller's reasoning or the reliability of his methodology, no mention is made *at all* about how or why he arrived at his conclusion that the Bowen text was the proper source to establish baselines for the area in question. Having reviewed the record, we certainly share the district court's obvious concern about Mr. Miller's selection of baseline values. *See, e.g., id.* at 010817-818. However, in the absence of specific, detailed findings, it is impossible for us on appeal to determine "whether the district court carefully and meticulously reviewed the proffered scientific evidence or simply made an off-the-cuff decision to admit the expert testimony." *Goebel*, 215 F.3d at 1088 (quotations omitted).

Regarding the causation testimony presented by Dr. Dollinger and Dr. Smith, the court likewise did not make adequate findings on the record to assure that the testimony offered was relevant and reliable, and that the particular opinions were based on valid reasoning and reliable methodology. In their entirety, the court's findings relating to Dr. Dollinger are as follows:

> What the Court is faced with is an expert witness in internal medicine and the subspecialty of oncology who has a very fine education - Yale medical school, Phi Beta Kappa - and other excellent background; who treats patients with cancer and other diseases; who has reviewed medical literature on the effects of molybdenum, lead, arsenic, uranium, on human beings, heavy metals; who perhaps is going to disagree with defendant's experts on many of these areas. But just because Dr. Dollinger's view may be a minority view or different from defendant's does not mean that he is not qualified as an expert opinion in the area of internal medicine, oncology, to - to give testimony on whether or not different heavy metals are substantial causes of whatever the ailments are.
>
> Now, I will take objections as we go along; and if something appears to be far afield from his specialty, I will consider the objection of Counsel.
>
> But right now, we have a very highly qualified expert in the field of internal medicine and oncology who has a theory that - concerning the causes of cancer and other diseases which may be different from defendant's experts. Nevertheless, I think in this case

> the jury should be able to hear his opinions and conclusions and decide for themselves.
>
> So according to the direction of the Tenth Circuit, which is that this court should vigilantly make detailed findings to fulfill the gatekeeper role, this court is satisfied that the jury may hear the opinions of Dr. Dollinger in this area, as far as we've gone so far, in this area under his speciality of oncology, a subspecialty of internal.
>
> Now, if we get into detailed neurology or arthritis, I am going to have to hear from him whether this is covered by his expertise or not. And it may be that some of these opinions may be ruled otherwise. But I think I'm going to have to just take that as it comes up.
>
> The Court will permit him to testify.

Aplt. App. at 011550-552. Again, we lack specific, detailed findings about Dr. Dollinger's reasoning or the reliability of his methodology in arriving at his conclusions. As with Mr. Miller, the court's findings relative to Dr. Dollinger's credentials and qualifications are simply insufficient by themselves to fulfill the gatekeeper function. As we have emphasized, "a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist." *Mitchell*, 165 F.3d at 783 (quoting *Rosen*, 78 F.3d at 318). These findings simply do not allow us to determine if the district court satisfied that requirement.

Similarly, the entirety of the district court's findings regarding Dr. Smith's testimony is as follows:

> In order to try to satisfy the Tenth Circuit test that they indicate the court must make, the Court will agree with the plaintiffs that by proffer and by testimony a couple years ago, there has been a showing that he is undisputably an expert in the area of toxicology. It's been indicated that his methodology is the same as the methodology that is used in nonlitigation cases. He doesn't have to see patients. He's a Ph.D., not an M.D. He has apparently done research, himself, on heavy metals. He teaches doctors about toxicology, and the plaintiff is conceding that there is no study in risk exposure, if I'm understanding plaintiffs correctly - . . . numerical risk exposure. So the Court will overrule the objections, the *Daubert* objections as to Dr. Smith, and we'll see how it goes.

Id. at 012166. Although the court apparently alludes to Dr. Smith's methodology, it made no specific findings and really did nothing more than note an indication that his methodology was the same as that used outside the context of litigation. *Id.* Even if the court's musings could be considered findings, they do not allow us to determine if the court applied the proper legal standard. As we observed in *Dodge I*, "given the novelty of the medical causation theory here," such findings are essential. 203 F.3d at 1200 n.12.

Even had the district court performed its gatekeeper function, on this record we would be inclined to conclude that the court abused its discretion by unreasonably limiting the

evidence upon which to base the decision. It is plain that a district court exercises significant discretion in deciding how to perform its gatekeeper role. *Kumho Tire*, 526 U.S. at 158. While we have held that a *Daubert* hearing is but one method a court might choose to fulfill its gatekeeper obligation, we have also emphasized that ultimately, the obligation can be satisfied only if "the court has sufficient evidence to perform the task." *Goebel*, 215 F.3d at 1087 (quotation omitted). Therefore, although a district court has discretion to limit the information upon which it will decide the *Daubert* issue, we review the exercise of that discretion for its abuse. *See, e.g., United States v. Nichols*, 169 F.3d 1255, 1262-63 (10th Cir. 1999); *United States v. Call*, 129 F.3d 1402, 1405 (10th Cir. 1997).

The important issue here is the aggregate effect of several of the district court's decisions. Initially, the court limited the length of any *Daubert* brief and appendix to 20 pages. Aplt. App. at 009857-858. Though the court was put on notice of specific challenges to certain experts' methodology and reasoning, it insisted on the exclusive use of argument and proffers at the *Daubert* hearing instead of meaningful live witness testimony. *Id.* at 010166. Although a detailed, in-depth hearing addressing disputed reasoning and methodologies was critical to a proper resolution of the entire case, the *Daubert* hearing lasted just over four hours and allowed for little more than a cursory review of the contested issues. The court itself proved this point by asking questions of counsel that only the expert could realistically answer. *See, e.g., id.* at 010775, 010793-796, 010801-802, 010804.

After noting the need to hear from the experts in person to decide difficult issues, the court reserved ruling on

admissibility until trial. *Id.* at 010839-840. And, although the court recognized the existence of significant reasoning and methodology problems, *id.* at 010817-818, it again declined to accept proffers of the experts' reports and full copies of all relevant studies upon which the experts relied. *Id.* at 010841-842. Finally, during the in camera voir dire of each expert at trial, which was the *only* time the court heard directly from the experts themselves, the court appeared to place a greater emphasis on keeping the voir dire brief than on a review of reasoning and methodology. *See, e.g., id.* at 011538-540, 011546, 012015, 012028, 012033, 012159.

Although each of the court's decisions taken by itself might well be within its discretion, taken together, these decisions placed an unreasonable limitation on the information available to the court and in our view exceeded the bounds of permissible choice in the circumstances. In a case like this one, where the expert testimony is crucial to the ultimate outcome, is vigorously challenged, and has several obvious areas of concern, we think it unreasonable to limit so severely both the underlying documentation and the use of live witness testimony upon which the court might base a decision. This was not a case where the parties agreed that the *Daubert* issues could be decided on a stipulated record, nor was it an "ordinary case[] where the reliability of an expert's methods [could] properly [be] taken for granted." *Kumho Tire*, 526 U.S. at 152. On the contrary, in this case, we fail to see how the *Daubert* issues could be reliably decided without a meaningful hearing, which of necessity depends upon the use of live witness testimony as opposed to attorneys' arguments. Because we have concluded that the district court did not perform its gatekeeper role, we do not have before us the findings required to determine definitely if the court abused

its discretion by so limiting the evidence. However, from the record we do have before us, taken as a whole, we would be inclined to conclude that the court did abuse its discretion.

Having concluded that the district court improperly admitted the expert testimony by failing to perform its gatekeeper obligation, we now turn to the appropriate remedy. Given the vast investment of resources in this case by both parties and by the federal judiciary, we are reluctant to render a decision that will further delay a final resolution. Nonetheless, we must be faithful to our precedents which dictate that we reverse and remand to the district court for a new trial. *See, e.g., Goebel*, 215 F.3d at 1089; *Velarde*, 214 F.3d at 1211, 1213. In this case, we are simply unable to conclude that the erroneous admission of this expert testimony was harmless. As we stated in Goebel, "erroneous admission of evidence is harmless only if other competent evidence is 'sufficiently strong' to permit the conclusion that the improper evidence had no effect on the decision." 215 F.3d at 1089 (quoting *Lillie v. United States*, 953 F.2d 1188, 1192 (10th Cir. 1992)). Here, the testimony of these experts was nothing short of essential to each of the plaintiffs' claims. *See, e.g.*, Aplt. App. at 016094 (elements of negligence claim); *id.* at 016104 (elements of medical monitoring claim); *id.* at 016099 (elements of trespass claim).

We decline to entertain the possibility of a remand to the district court to make specific findings relative to these experts, for we think no district court would be well positioned to make valid findings given the overwhelming temptation to engage in post hoc rationalization of admitting the experts. We are further persuaded on this issue by the following reasoning of one of our sister circuits:

> To remand for an evidentiary hearing post-jury verdict undermines *Daubert*'s requirement that *some* reliability determination must be made by the trial court *before* the jury is permitted to hear the evidence. Otherwise, instead of fulfilling its mandatory role as a gatekeeper, the district court clouds its duty to ensure that only reliable evidence is presented with impunity. A post-verdict analysis does not protect the purity of the trial, but instead creates an undue risk of post-hoc rationalization. This is hardly the gatekeeping role the Court envisioned in *Daubert* and its progeny.

Mukhtar v. Cal. State Univ., 319 F.3d 1073, 1074 (9th Cir. 2003), *amending* 299 F.3d 1053, 1066 (9th Cir. 2002). Accordingly, on the basis of our holdings in *Goebel* and *Velarde*, we reverse and remand *Dodge II* for a new trial.

III. The Impact on *Dodge III*

As we observed at the outset, the *Dodge III* verdict is tied directly to *Dodge II* given the district court's ruling that plaintiffs could make use of offensive collateral estoppel on the negligent conduct issue. Aplt. App. at 016848-851. Beyond this, however, in deciding whether to admit certain contested experts in *Dodge III*, the district court relied entirely on its decisions from *Dodge II*. As a result, the two cases are inextricably linked.

In *Dodge III*, Cotter once again moved to exclude under *Daubert* the testimony of several of the plaintiffs' experts, including Mr. Miller, Dr. Dollinger and Dr. Smith. *Id.* at 018798-935. Cotter also requested a *Daubert* hearing, *id.* at 018348-351, which the district court denied, explaining as

follows: "The Court has previously ruled on the admissibility of plaintiffs' expert testimony. To hold another hearing on the same experts, the same testimony, and the same disputes, would be duplicative, and a waste of the Court's time and resources." *Id.* at 019027. The court also denied Cotter's *Daubert* motion as it pertained to experts who testified in *Dodge II*. *Id.* at 020188.

Thus, as a result of its reliance on rulings made in *Dodge II*, the court in *Dodge III* again failed to make specific, detailed findings on the record to assure that the expert testimony offered was relevant and reliable, and that particular opinions were based on valid reasoning and reliable methodology. Therefore, for the reasons discussed at length above, we conclude that the district court abused its discretion in *Dodge III* by admitting the testimony of Mr. Miller, Dr. Dollinger and Dr. Smith. Furthermore, because the claims in *Dodge III* are the same as those alleged in *Dodge II* and because they depended upon this expert testimony just as much as the *Dodge II* claims, we have no recourse but to reverse and remand *Dodge III* for a new trial.[1]

For the foregoing reasons, we REVERSE and REMAND for new trial both *Dodge II* and *Dodge III*. The plaintiffs' cross appeals in both appeals are DENIED as moot. All other pending motions are DENIED as moot.

---

[1] Obviously, this conclusion moots the remaining issues raised in the cross-appeals. However, because the doctrine of offensive collateral estoppel might be reapplied on remand, the district court should be mindful that such application impacts both reliability of verdicts and due process rights of defendants.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 01-1197, 01-1236, 01-1591 and 02-1008

[Filed May 28, 2003]

JOSEPH DODGE, individually and as personal representative of the Estate of Thelma Dodge, et al.,	)
Plaintiffs-Appellees-Cross-Appellants,	)
v.	)
COTTER CORPORATION	)
Defendant-Appellant-Cross-Appellees.	)

Before **KELLY** and **O'BRIEN**, Circuit Judges, and **EAGAN***, District Judge.

ORDER

Appellees'/cross appellants' petition for rehearing is denied.

---

* The Honorable Claire V. Egan, United States District Judge for the Northern District of Oklahoma, sitting by designation.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ _____
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nos. 01-1197, 01-1236, 01-1591 and 02-1008

[Filed May 15, 2003]

JOSEPH DODGE, et al.,	)
	)
Plaintiffs-Appellees-Cross-Appellants,	)
	)
vs.	)
	)
COTTER CORPORATION	)
	)
Defendant-Appellant-Cross-Appellee.	)
	)

On Appeal from the United States District Court
For the District of Colorado

The Honorable Zita Weinshienk, District Judge

AMICUS BRIEF ON BEHALF OF THE ATTORNEYS GENERAL OF THE STATES OF NEW MEXICO, OKLAHOMA, AND WYOMING IN SUPPORT OF APPELLEES' PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Offices of the Attorneys General of the States of New Mexico, Oklahoma, and Wyoming, pursuant to Fed. R. App. P. 29(a), submit this brief in support of Appellees' Petition for Rehearing and Petition for Rehearing En Banc, which was filed with the Court on May 6, 2003. The Attorneys General believe the panel decision in this case conflicts with the decisions of the United States Supreme Court in *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137 (1999), and *General Elec. Co. v. Joiner,* 522 U.S. 136 (1997), and of the Tenth Circuit including, among others, *Goebel v. Denver & Rio Grande Western R. Co.,* 215 F.3d 1083 (10th Cir. 2000), and *United States v. Nichols,* 169 F.3d 1255 (10th Cir. 1999), which hold that specific forms of *Daubert* hearings and live witness testimony are not necessary to satisfy the district court's gatekeeper role. Consideration by the full court is therefore in order to secure and maintain uniformity of the court's decisions.

Furthermore, this appeal involves a question of exceptional importance regarding the proper roles of the trial and appellate courts in evaluating expert testimony under *Daubert v. Merrell Dow Pharms., Inc.,* 509 U.S. 579 (1993).

The panel's new construction of the requirements of *Daubert* and the reversal de novo of the trial court's process of conducting a pretrial *Daubert* hearing and making detailed *Daubert* findings could work a substantial hardship on governmental entities in their roles as enforcers of federal environmental laws such as the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. (CERCLA or Superfund), and other laws designed to protect the public interest. Accordingly, the Tenth Circuit should grant a rehearing en banc.

ARGUMENT

I. Introduction:

On April 22, 2003, a panel of this Court published an opinion (hereinafter "Opinion"), in the area of environmental pollution and toxic torts, reversing the judgments in 47 trespass and negligence cases tried as *"Dodge II"* and *"Dodge III,"* and remanding for new trials. The Opinion is attached as Exhibit "A". The Opinion on its face applies a "de novo" standard to not just *whether* the district court performed the gatekeeper function, but *how* it did so, in apparent contradiction to both United States Supreme Court and Tenth Circuit authority. The Opinion will impact the method that governments charged with enforcement of environmental and other laws prosecute such cases, and fails to give adequate guidance to federal district courts on proper handling of the very important *Daubert* expert issues in such cases.

The Opinion states:

> Even had the district court performed its gatekeeper function, on this record we would be inclined to conclude that the court abused its discretion ....
>
> Concluding that the [defendant's *Daubert*] motion [in limine] violated local court rules regarding length, the district court returned the motion mad accompanying [several thousand page] appendix and allowed Cotter to file a revised motion and appendix, neither of which could exceed 20 pages in length.... At the [pretrial] *Daubert* hearing... citing Cotter's failure to notify the court of this intention...the court refused to allow any live witness testimony.
>
> [The district Court] insisted on the exclusive use of argument and proffers at the *Daubert* hearing . . . [which] lasted just over four hours . . . [and thereafter conducted an] in camera voir dire of each expert at trial [before ruling on admissibility] ....
>
> Opinion at 30, 21-22, 30-31.

The Opinion does not provide guidance on what procedures will be acceptable in the future for the district courts and prosecutors to successfully comply with the Tenth Circuit's *Daubert* requirements, under an abuse of discretion review. The panel opinion can be read to *require* even more extensive hearings pretrial with unlimited live witnesses and without proscribed limits on the size of briefs and other materials filed with the court. Obviously, this opinion can be used to justify virtually unchecked *Daubert* hearings pretrial, on pain of

reversal for abuse of discretion. This opinion is, consequently, of very serious concern for law enforcement officials in both the criminal and civil areas.

II. The Opinion Improperly Applied De Novo Review to "How" the District Court Performed its Gatekeeper Task under *Daubert*

As the United States Supreme Court has directed, the trial judge is to make the decision on the admissibility of expert testimony, and not the court of appeals. *General Elec. Co. v. Joiner,* 522 U.S. 136, 138 (1997). The question of admission of expert testimony is an *evidence* issue, and under the framework set out in *Daubert* and as expanded upon by more recent Supreme Court and Tenth Circuit cases, the trial court is in the best position to hear and evaluate the evidence and determine whether expert testimony is reliable, relevant, and thus admissible under Fed. R. Evid. 702. The appellate court is not to undertake a second detailed examination of the evidence, devise new and different methods for evaluating the expert evidence, or reverse the district court in order to achieve a different .result. *Joiner,* 522 U.S. at 138-139; *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 152 (1999). It is not to evaluate de novo "*how*" the district court performed its *Daubert* role, but it is only to review de novo *whether* the district court performed any *Daubert* analysis. *Goebel v. Denver & Rio Grande Western R. Co.,* 215 F.3d 1083, 1088 (10th Cir. 2000).

The Opinion states that the district court held a pretrial *Daubert* hearing, reviewed briefs, declarations and heard argument on the experts that were challenged. The trial judge further allowed defendant live cross-examination and voir dire

in camera, before ruling on admissibility and allowing the experts to give their opinions. Opinion at 21-25, 30-31. The Opinion recites that the trial court did acknowledge that she was mindful of the *Daubert* requirement and the Tenth Circuit's directions to make detailed findings, and made on the record findings as to the admissibility of each expert. Opinion at 28, 29. Thus, based on the face of the Opinion, the *Dodge* trial judge did perform gatekeeper functions regarding the reliability and methodology of the challenged experts. Opinion at 21. Using the panel's test, other *Daubert* procedures, which have passed muster in the Tenth Circuit prior to the new *Dodge* rule, would not do so now. *See, e.g., United States v. Nichols,* 169 F.3d 1255, 1262-63 (10th Cir. 1999). Furthermore, *Kumho Tire* itself holds that a separate *Daubert* hearing is not required.

> The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable.... Indeed, the Rules seek to avoid "unjustifiable expense and delay" as part of their search for "truth" and the "jus[t] determin[ation]" of proceedings. *Kumho Tire,* 526 U.S. at 152-53; *see also United States v. Alatorre* , 222 F.3d 1098, 1102-1104 (9th Cir. 2000)(holding no separate *Daubert* hearing required), *cited in Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1064 (9th Cir. 2002).

III. Disturbing Effect on Law Enforcement Efforts

Ultimately, the panel here, by its own statement of the standard, necessarily had to find that the enumerated efforts

by the district court over years of case management in a complex environmental case involving a declared Super Fund site were "arbitrary, capricious, whimsical or manifestly unreasonable [constituted] a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." Opinion at 20.

As a practical matter, the Opinion will hinder enforcement of environmental laws, such as CERCLA, the Price Anderson Act (42 U.S.C. § 2011 et seq.) , criminal prosecutions, securities fraud, antitrust, and other cases where expert testimony is crucial. The panel's proposed standard and lack of guidance on limits to required *Daubert* procedures demanded by defendants will significantly increase the strain on judicial resources, requiring, as it seems, some sort of mandatory trial before trial. Such a standard would work an unfair and prejudicial hardship on governments charged with enforcement of the laws on behalf of all citizens, and make litigating such cases prohibitively expensive. Moreover, mass tort and environmental contamination cases to be brought by state entities will not be viable if the normal judicial processes are ignored and these cases are singled out for protracted procedures without limits.

Granting Appellees' petitions for rehearing and for hearing en banc will provide the full court the opportunity to better assess the chilling ramifications of the Opinion on the government's pursuit of both Civil and criminal enforcement matters that depend in large measure upon the presentation of expert witness testimony for their successful prosecution.

IV. Conclusion

For the foregoing reasons, this Court should grant Appellees' Petition for Rehearing and Rehearing En Banc.

Dated: May 14, 2003

Respectfully Submitted,

PATRICIA A. MADRID
Attorney General of New Mexico

/s/ _____
Glenn R. Smith
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that pursuant to Rule 32(a)(7)(B)(I) FRAP, 2001, this Brief contains 1,962 words.

/s/ _____
David K. Thomson
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that on this 14th day of May, 2003, I deposited a true and correct copy of **AMICUS BRIEF ON BEHALF OF THE ATTORNEYS GENERAL OF THE**

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ATTACHMENTS

Opinion of United States Court of Appeals filed April 22, 2003, in Case Nos. 01-1197, 01-1236, 01-1591 and 02-1008 by the Honorable Circuit Judges Kelly and O'Brien and the Honorable District Judge Claire V. Eagan.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Nos. 01-1197, 01-1236, 01-1591 and 02-1008

[Filed May 20, 2003]

JOSEPH DODGE, et al.,	)
	)
Plaintiffs-Appellees-Cross-Appellants,	)
	)
v.	)
	)
COTTER CORPORATION	)
	)
Defendant-Appellant-Cross-Appellees.	)
	)

Before **KELLY** and **O'BRIEN**, Circuit Judges, and **EAGAN***, District Judge.

ORDER

The request of the attorneys general of the states of New Mexico, Oklahoma and Wyoming to file an amicus brief in support of the petition for rehearing is denied.

---

* The Honorable Claire V. Egan, United States District Judge for the Northern District of Oklahoma, sitting by designation.

Entered for the Court

PATRICK FISHER, Clerk of Court

by: /s/ _____
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APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 91-Z-1861

[Filed April 24, 2001]

RUSSELL JEWETT, BONITA JEWETT, CANON FARMS TRUST, NARD CLAAR, SARA CLAAR, LINDA JOHNSON, ALICIA JOHNSON, BLAINE JOHNSON, JULIE WRIGHT, JENNIFER WRIGHT, NICOLE WRIGHT, MIKE HADLEY, and CATHERINE HADLEY,	)
Plaintiffs,	)
v.	)
COTTER CORPORATION,	)
Defendant.	)

AMENDED FINAL JUDGMENT

This matter came on for trial before the Court and a jury of nine beginning on October 2, 2000, the Honorable Zita L. Weinshienk, United States District Judge, presiding.

At the conclusion of all of the evidence, the jury returned its Special Verdict Forms as follows:

1. That defendant Cotter Corporation was negligent in the operation of its Uranium Processing Mill so as to allow release of hazardous material from the site as to all plaintiffs.

2. That the negligence of defendant Cotter Corporation was not a substantial contributing cause of any injuries, damages or losses to any plaintiffs.

3. In favor of plaintiffs Nard Claar, Sara Claar, Russell Jewett, Bonita Jewett, Linda Johnson, Alicia Johnson, Blaine Johnson, Julie Wright, Jennifer Wright, Nicole Wright, Mike Hadley and Catherine Hadley as to medical monitoring.

4. That defendant Cotter trespassed on the property of plaintiffs Canon Farms Trust, Nard Claar, Sara Claar, Linda Johnson, Alicia Johnson, Blaine Johnson, Julie Wright, Jennifer Wright, Nicole Wright, Mike Hadley, and Catherine Hadley, and damages are awarded for said trespass as follows:

Canon Farms Trust	$3,500.00
Nard Claar	$5,000.00
Sara Claar	$5,000.00
Linda Johnson	$6,000.00
Alicia Johnson	$3,000.00
Blaine Johnson	$3,000.00
Julie Wright	$6,000.00

Jennifer Wright	$3,000.00
Nicole Wright	$3,000.00
Mike Hadley	$2,500.50
Catherine Hadley	$2,500.50

It is therefore,

ORDERED that judgment is entered in favor of plaintiffs and against defendant Cotter Corporation as follows: Nard Claar in the amount of $5,000.00 and medical monitoring; Sara Claar in the amount of $5,000.00 and medical monitoring; Linda Johnson in the amount of $6,000.00 and medical monitoring; Alicia Johnson in the amount of $3,000.00 and medical monitoring; Blaine Johnson in the amount of $3,000.00 and medical monitoring; Julie Wright in the amount of $6,000.00 and medical monitoring; Jennifer Wright in the amount of $3,000.00 and medical monitoring; Nicole Wright in the amount of $3,000.00 and medical monitoring; Mike Hadley in the amount of $2,500.50 and medical monitoring; Catherine Hadley in the amount of $2,500.50 and medical monitoring; Canon Farms Trust in the amount of $3,500.00; Russell Jewett for medical monitoring; Bonita Jewett for medical monitoring. It is

FURTHER ORDERED that plaintiffs Canon Farms Trust, Nard Claar, Sara Claar, Russell Jewett, Bonita Jewett, Linda Johnson, Alicia Johnson, Blaine Johnson, Julie Wright, Jennifer Wright, Nicole Wright, Mike Hadley and Catherine Hadley shall have their costs upon the filing of a Bill of Costs with the Clerk of the court within ten (10) days of entry of judgment. It is

FURTHER ORDERED that post-judgment interest shall accrue at the legal rate of 6.241% per annum from the date of entry of judgment. It is

FURTHER ORDERED that a judgment requiring medical monitoring in favor of all individual plaintiffs and against defendant Cotter is entered in the amount of $241,300 to be placed in a trust or an escrow account. It is

FURTHER ORDERED that a judgment covering pre-judgment interest shall enter in favor plaintiffs as follows:

Canon Farms Trust	$3,921.00
Nard Claar	$9,012.00
Sara Claar	$9,012.00
Linda Johnson	$6,722.00
Alicia Johnson	$3,361.00
Blaine Johnson	$3,361.00
Julie Wright	$6,722.00
Jennifer Wright	$3,361.00
Nicole Wright	$3,361.00
Mike Hadley	$4,506.00
Catherine Hadley	$2,801.00

It is FURTHER ORDERED that as there is no just reason for delay, the Court expressly directs that this judgment be entered as a final judgment pursuant to Fed. R. Civ. P. 54(b).

DATED at Denver, Colorado, this 24 day of April, 2001, *nunc pro tunc* January 18, 2001.

BY THE COURT:

/s/ _____
ZITA L. WEINSHIENK, Senior Judge
United States District Court

April 24, 2001

Civil Action No. 91-Z-1861

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of the foregoing entered by Judge Zita L. Weinshienk and filed on April 24, 2001, were mailed or hand delivered to the following:

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Magistrate Judge O. Edward Schlatter

JAMES R. MANSPEAKER, Clerk

By /s/ _____
Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 01-1197

[Filed June 8, 2001]

JOSEPH DODGE, et al.,	)
	)
Plaintiffs-Appellees,	)
	)
v.	)
	)
COTTER CORPORATION, et al.,	)
	)
Defendants-Appellants.	)
	)

Before **KELLY** and **MURPHY**, Circuit Judges.

ORDER

This matter is before the court on "Appellant's Motion to Extend Time to File Opening Brief." The motion is granted as provided herein. The briefing schedule in this appeal is abated pending final disposition of *Dodge V. Cotter Corp.*, No. 91-Z-1861 (D. Colo.). Appellant's counsel shall notify the court immediately after *Dodge v. Cotter Corp.*, No. 91-Z-1861 (D. Colo.), is fully resolved in the trial court. The briefing schedule on the cross-appeals will recommence upon

entry of judgment in *Dodge v. Cotter Corp.*, No. 91-Z-1861 (D. Colo.), with appellant's opening brief due 45 days from the date of that judgment.

Entered for the Court

PATRICK FISHER, Clerk of Court

by: /s/ _____
Jeanne E. Herrick-Stare
Counsel to the Clerk/Deputy Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 91-Z-1861

[Filed July 6, 2001]

JOSEPH DODGE, et al.,)
Plaintiffs,)
)
v.)
)
COTTER CORPORATION,)
Defendant.)
)

JUDGMENT

This matter came on for trial before the Court and a jury of eight beginning on May 9, 2001, the Honorable Zita L. Weinshienk, United States District Judge, presiding.

At the conclusion of all of the evidence, on June 28, 2001, the jury returned its Special Verdict Forms, which are incorporated by reference as if fully set forth herein. Accordingly, it is

ORDERED that judgment is entered in favor of the following plaintiffs and against defendant Cotter Corporation:

1. The Aspen Trust: $30,000.00 related to Cotter's trespass and $30,000.00 for punitive damages for a total of $60,000.00.

2. Dolene Blue: $15,000.00 related to Cotter's trespass and $10,000.00 for punitive damages for a total of $25,000.00.

3. Rhonda Butson: $519,000.00 for economic damages, $250,000.00 for non-economic damages, and $100,000.00 for punitive damages for a total of $869,000.00, and medical monitoring.

4. August Chrysler: medical monitoring.

5. Clayton Chrysler: medical monitoring.

6. Daniel Chrysler: $375,000.00 for economic damages, $100,000.00 for non-economic damages, and $100,000.00 for punitive damages for a total of $475,000.00 and medical monitoring.

7. Desiree Chrysler $392,100.00 for economic damages, $250,000.00 for non-economic damages, and $100,000.00 for punitive damages for a total of $742,100.00, and medical monitoring.

8. Bryan Dodge: $130,000.00 for economic damages and $100,000.00 for punitive damages for a total of $230,000.00, and medical monitoring.

9. Connie Dodge: $320,000.00 for economic damages, $10,000.00 for non-economic damages, $20,000.00

related to Cotter's trespass, and $100,000.00 for punitive damages for a total of $450,000.00, and medical monitoring.

10. Joseph Dodge: $663,500.00 for economic damages, $500,000.00 for non-economic damages, $221,900.00 related to Cotter's trespass, and $100,000.00 for punitive damages for a total of $1,485,400.00, and medical monitoring.

11. Leslie Dodge: $250,000.00 for economic damages and $100,000.00 for punitive damages for a total of $350,000.00, and medical monitoring.

12. Nathan Dodge: $260,000.00 for economic damages and $100,000.00 for punitive damages for a total of $360,000.00, and medical monitoring.

13. Patrick C. Dodge: $130,000.00 for economic damages and $100,000.00 for punitive damages for a total of $230,000.00, and medical monitoring.

14. Patrick Shane Dodge: $850,000.00 for economic damages, $250,000.00 for non-economic damages, $20,000.00 related to Cotter's trespass, and $100,000.00 for punitive damages for a total of $1,220,000, and medical monitoring.

15. Shaylee Dodge: medical monitoring.

16. Tristan Dodge: $50,000.00 for economic damages and $50,000.00 for punitive damages for a total of $100,000.00, and medical monitoring.

17. Bruce Hadley: $138,400.00 for economic damages, $75,000.00 for non-economic damages, $25,000.00 related to Cotter's trespass, and $100,000.00 for punitive damages for a total of $338,400.00, and medical monitoring.

18. Jack Hadley: $570,000.00 for economic damages, $150,000.00 for non-economic damages, and $100,000.00 for punitive damages for a total of $820,000.00, and medical monitoring.

19. Virginia Hadley: $174,600.00 for economic damages, $75,000.00 for non-economic damages, $25,000.00 related to Cotter's trespass, and $100,000.00 for punitive damages for a total of $374,600.00, and medical monitoring.

20. Brett Luna: $2,900,000.00 for economic damages, $50,000.00 for damages for disfigurement, $50,000.00 for non-economic damages, and $100,000.00for punitive damages for a total of $3,100,000.00, and medical monitoring.

21. Donald Luna: $490,000.00 for economic damages. $200,000.00 for non-economic damages, and $100,000.00 for punitive damages for a total of $790,000.00, and medical monitoring.

22. Sonja Luna: $195,000.00 for economic damages, $200,000.00 for non-economic damages, and $100,000.00 for punitive damages for a total of $495,000.00, and medical monitoring.

23. Casey Myers: medical monitoring.

24. Chad Myers: medical monitoring.

25. Kim Myers: $255,000.00 for economic damages, $10,000.00 for non-economic damages, $11,000.00 related to Cotter's trespass, and $100,000.00 for punitive damages for a total of $376,000.00, and medical monitoring.

26. Sidney Myers: $11,000.00 related to Cotter's trespass and $10,000.00 for punitive damages for a total of $21,000.00, and medical monitoring.

27. Yvonne Pegararo: $500,000.00 for economic damages, $250,000.00 for non-economic damages, and $100,000.00 for punitive damages for a total of $850,000.00, and medical monitoring.

28. Norman Platt: $332,400.00 for economic damages, $500,000.00 for non-economic damages, $49,000.00 for damages related to Cotter's trespass, and $100,000.00 for punitive damages for a total of $981,400.00.

29. Daniel Slanovich: $525,000.00 related to Cotter's trespass and $100,000.00 for punitive damages for a total of $625,000.00.

30. Gus Slanovich: $525,000.00 related to Cotter's trespass and $100,000.00 for punitive damages for a total of $625,000.00.

31. James Treat: $80,400.00 related to Cotter's trespass and $60,000.00 for punitive damages for a total of $140,400.00.

32. Jeremiah Welch: medical monitoring.

33. Noah Welch: medical monitoring.

It is FURTHER ORDERED that judgment is entered in favor of defendant Cotter Corporation and against plaintiff Shaylee Hadley. It is

FURTHER ORDERED that prejudgment interest shall accrue as provided by law. It is

FURTHER ORDERED that post-judgment interest shall accrue at the legal rate of 3.60% per annum from the date of entry of judgment. It is

FURTHER ORDERED that the prevailing plaintiffs shall have their costs upon the filing of a Bill of Costs with the Clerk of the Court within ten (10) days of entry of judgment. It is

FURTHER ORDERED that the parties may file declarations on the issue of medical monitoring within 30 days.

DATED at Denver, Colorado, this 6 day of July, 2001.

BY THE COURT:

/s/ _____
ZITA L. WEINSHIENK, Senior Judge
United States District Court

July 6, 2001

Civil Action No. 91-Z-1861

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of the foregoing entered by Judge Zita L. Weinshienk and filed on July 6, 2001, were mailed or hand delivered to the following:

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Magistrate Judge O. Edward Schlatter

JAMES R. MANSPEAKER, Clerk

By /s/ _____
Deputy Clerk

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 91-Z-1861

[Filed November 20, 2001]

JOSEPH DODGE, et al.,
Plaintiffs,

v.

COTTER CORPORATION,
Defendant.

AMENDED FINAL JUDGMENT

This matter came on for trial before the Court and a jury of eight beginning on May 9, 2001, the Honorable Zita L. Weinshienk, United States District Judge, presiding.

At the conclusion of all of the evidence, other than the amount of medical monitoring damages, on June 28, 2001, the jury returned its Special Verdict Forms as follows:

ORDERED that judgment is entered in favor of the following plaintiffs and against defendant Cotter Corporation:

1. The Aspen Trust: $30,000.00 for Cotter's trespass, and $30,000.00 for punitive damages, for a total of $60,000.00.

2. Dolene Blue: $15,000.00 for Cotter's trespass, and $10,000.00 for punitive damages, for a total of $25,000.00.

3. Rhonda Butson: $519,000.00 for economic damages, $250,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $869,000.00, and medical monitoring.

4. August Chrysler: medical monitoring.

5. Clayton Chrysler: medical monitoring.

6. Daniel Chrysler: $375,000.00 for economic damages, $100,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $575,000.00, and medical monitoring.

7. Desiree Chrysler: $392,100.00 for economic damages, $250,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $742,100.00, and medical monitoring.

8. Bryan Dodge: $130,000.00 for economic damages, and $100,000.00 for punitive damages, for a total of $230,000.00, and medical monitoring.

9. Connie Dodge: $20,000.00 for Cotter's trespass, $320,000.00 for economic damages, $10,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $450,000.00, and medical monitoring.

10. Joseph Dodge: $221,900.00 for Cotter's trespass, $663,500.00 for economic damages, $500,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $1,485,400.00, and medical monitoring.

11. Leslie Dodge: $250,000.00 for economic damages, and $100,000.00 for punitive damages, for a total of $350,000.00, and medical monitoring.

12. Nathan Dodge: $260,000.00 for economic damages, and $100,000.00 for punitive damages, for a total of $360,000.00, and medical monitoring.

13. Patrick C. Dodge: $130,000.00 for economic damages, and $100,000.00 for punitive damages, for a total of $230,000.00, and medical monitoring.

14. Patrick Shane Dodge: $20,000.00 for Cotter's trespass, $850,000.00 for economic damages, $250,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $1,220,000.00, and medical monitoring.

15. Shaylee Dodge: medical monitoring.

16. Tristan Dodge: $50,000.00 for economic damages, and $50,000.00 for punitive damages, for a total of $100,000.00, and medical monitoring.

17. Bruce Hadley: $25,000.00 for Cotter's trespass, $138,400.00 for economic damages, $75,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $338,400.00, and medical monitoring.

18. Jack Hadley: $570,000.00 for economic damages, $150,000.00 for non-economic damages, and $100,000.00 for punitive damages for a total of $820,000.00, and medical monitoring.

19. Virginia Hadley: $25,000.00 for Cotter's trespass, $174,600.00 for economic damages, $75,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $374,600.00, and medical monitoring.

20. Brett Luna: $2,900,000.00 for economic damages, $50,000.00 for damages for disfigurement, $50,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $3,100,000.00, and medical monitoring.

21. Donald Luna: $490,000.00 for economic damages, $200,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $790,000.00, and medical monitoring.

22. Sonja Luna: $195,000.00 for economic damages, $200,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $495,000.00, and medical monitoring.

23. Casey Myers: medical monitoring.

24. Chad Myers: medical monitoring.

25. Kim Myers: $11,000.00 for Cotter's trespass, $255,000.00 for economic damages, $10,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $376,000.00, and medical monitoring.

26. Sidney Myers: $11,000.00 for Cotter's trespass, and $10,000.00 for punitive damages, for a total of $21,000.00, and medical monitoring.

27. Yvonne Pegararo: $500,000.00 for economic damages, $250,000.00 for non-economic damages, and $100,000.00 for punitive damages, for a total of $850,000.00, and medical monitoring.

28. Norman Platt: $332,400.00 for economic damages, $500,000.00 for non-economic damages, $49,000.00 for damages related to Cotter's trespass, and $100,000.00 for punitive damages for a total of $981,400.00.

29. Daniel Slanovich: $525,000.00 for Cotter's trespass,.and $100,000.00 for punitive damages, for a total of $625,000.00.

30. Gus Slanovich: $525,000.00 for Cotter's trespass, and $100,000.00 for punitive damages, for a total of $625,000.00.

31. James Treat: $80,400.00 for Cotter's trespass and $60,000.00 for punitive damages for a total of $140,400.00.

32. Jeremiah Welch: medical monitoring.

33. Noah Welch: medical monitoring.

It is FURTHER ORDERED that judgment is entered in favor of defendant Cotter Corporation and against plaintiff Shaylee Hadley. It is

FURTHER ORDERED that after reviewing plaintiffs' and defendant's evidence on the amount of damages to be awarded for medical monitoring the Court makes a finding that plaintiffs shall have a verdict of $651,658 for the amount of their medical monitoring damages and a judgment requiting medical monitoring in favor of the individual plaintiffs, as indicated above, and against defendant Cotter, is entered in the amount of $651,658 to be placed in a trust or an escrow account. It is

FURTHER ORDERED that the judgment including statutory pre-judgment interest from the time of accrual until

the time of entry of the judgment on July 6, 2001, shall enter in favor of plaintiffs as follows:

- The Aspen Trust in the amount of $38,799.00;
- Dolene Blue in the amount of $21,952.00;
- Rhonda Butson in the amount of $1,327,682.00;
- Daniel Chrysler in the amount of $820,090.00;
- Desiree Chrysler in the amount of $1,108,588.00;
- Bryan Dodge in the amount of $131,520.00;
- Connie Dodge in the amount of $599,016.00;
- Joseph Dodge in the amount of $2,333,536.00;
- Leslie Dodge in the amount of $431,626.00;
- Nathan Dodge in the amount of $448,891.00;
- Patrick C. Dodge in the amount of $197,930.00;
- Patrick Shane Dodge in the amount of $1,928,425.00;
- Tristan Dodge in the amount of $18,449.00;
- Bruce Hadley in the amount of $533,472.00;
- Jack Hadley in the amount of $1,639,321.00;

- Virginia Hadley in the amount of $615,894.00;
- Brett Luna in the amount of $5,179,513.00;
- Donald Luna in the amount of $1,191,288.00;
- Sonja Luna in the amount of $681,969.00;
- Kim Myers in the amount of $624,302;
- Sidney Myers in the amount of $20,942.00;
- Yvonne Pegararo in the amount of $1,294,878.00;
- Norman Platt in the amount of $1,988,523.00;
- Daniel Slanovich in the amount of $768,331.00;
- Gus Slanovich in the amount of $768,331.00; and
- James Treat in the amount of $103,982.00. It is

FURTHER ORDERED that plaintiffs are awarded their costs in the amount of $53,905.91. It is

FURTHER ORDERED that post-judgment interest on these amounts shall accrue at the legal rate of 3.60% per annum, from July 6, 2001. It is

FURTHER ORDERED that the execution of the judgment in this case is stayed until defendant's time for filing an appeal has expired (that is, 30 days from the date of this Final Judgment). If defendant files a timely appeal, then the stay

shall remain in place during the pendency of the appeal upon the filing of a supersedeas bond for the full amount of the judgment, costs, and prejudgment interest, in the amount of $41,756,113.91, plus one year of post-judgment interest thereon in the amount of $1,503,220.10, for a total amount of $43,259,334.01.

DATED at Denver, Colorado, this 20 day of November, 2001.

BY THE COURT:

/s/ _____
ZITA L. WEINSHIENK, Senior Judge
United States District Court

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Senior Judge Zita L. Weinshienk

Civil Action No. 91-Z-1861

[Filed June 10, 2003]

JOSEPH DODGE, et al.,)
Plaintiffs,)
)
v.)
)
COTTER CORPORATION,)
Defendant.)
)

ORDER

After consideration of the case file herein, I hereby exercise my discretion as a senior judge to decline this case. Therefore, it is

ORDERED that this case is returned to the Clerk's office for reassignment to another judge.

Dated at Denver Colorado, this 9 day of June, 2003.

BY THE COURT:

/s/ _____
ZITA L. WEINSHIENK, Senior Judge
United States District Court

June 10, 2003

Civil Action No. 91-Z-1861

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the above date copies of the foregoing entered by Judge Zita L. Weinshienk and filed on June 10, 2003, were mailed or hand delivered to the following:

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Magistrate Judge O. Edward Schlatter

By /s/ _____
Deputy Clerk

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Edward W. Nottingham

Civil Action No. 91-N-1861 (OES)

[Filed June 13, 2003]

JOSEPH DODGE, *et al.*,	)
Plaintiffs,	)
	)
v.	)
	)
COTTER CORPORATION,	)
Defendant.	)
	)

ORDER

This matter is before the court as a result of a random reassignment from the clerk's office, Judge Weinshienk having exercised her prerogative as a senior judge to ask for reassignment. The file discloses that the United States Court of Appeals for the Tenth Circuit issued its mandate on June 6, 2003. Issuance of the mandate would appear to allow the case to go forward in this court, but it also appears that the time within which plaintiffs might apply for Supreme Court review has not yet expired. Accordingly, to clarify this issue and to elucidate the status of the case, it is

ORDERED that the parties, jointly or separately, will file status reports on or before July 1, 2003.

Dated this 12 day of June, 2003.

BY THE COURT:

/s/ _____
EDWARD W. NOTTINGHAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 91-N-1861 (OES)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Order signed by Judge Edward W. Nottingham on June 12, 2003 was served on June 13, 2003 by hand-delivery, where a "D.C." box number or asterisk (*) is indicated after the recipient's name, by electronic mail to the electronic mail address specified where a double asterisk (**) is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

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GREGORY C. LANGHAM, CLERK

By /s/ _____
Secretary or Deputy Clerk

APPENDIX K

RULES AND STATUTES INVOLVED

USCS Fed Rules Evid R 702

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

HISTORY: (Jan. 2, 1975, P.L. 93-595, §§ 1, 88 Stat. 1937.) (As amended Dec. 1, 2000.)

28 USCS § 1291

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of

the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

USCS Fed Rules Civ Proc Rule 59
New Trials; Amendment of Judgments

Rule 59(e)

(e) Motion to Alter or Amend Judgment. Any motion to alter or amend a judgment shall be filed no later than 10 days after entry of the judgment.

HISTORY: (Amended March 19, 1948; July 1, 1966; Dec. 1, 1995.)

USCS Fed Rules Civ Proc Rule 60
Relief from Judgment or Order

Rule 60(a)

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

USCS Fed Rules App Proc Rule 4
Appeal as of Right--When Taken

Rule 4(a)(1)(A)

(a) Appeal in a Civil Case.
(1) Time for Filing a Notice of Appeal.
(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

Rule 4(a)(4)(A)

(4) Effect of a Motion on a Notice of Appeal.
(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:
(i) for judgment under Rule 50(b);
(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
(iv) to alter or amend the judgment under Rule 59;
(v) for a new trial under Rule 59; or
(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

HISTORY: (Amended April 30, 1979, effective Aug. 1, 1979; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle C, §§

7111, 102 Stat. 4419; Dec. 1, 1991; Dec. 1, 1995; Dec. 1, 1998.) (As amended Dec. 1, 2002.)

USCS Fed Rules App Proc Rule 29
Brief of an Amicus Curiae

Rule 29(a)

(a) When Permitted. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

HISTORY: (Amended Dec. 1, 1998.)

Supreme Court, U.S.
FILED
OCT 6 2003
OFFICE OF THE CLERK

No. 03-332

IN THE

Supreme Court of the United States

JOSEPH DODGE, individually and as personal representative of the Estate of Thelma Dodge, *et al.*,
Petitioners,

v.

COTTER CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Cotter Corporation, Defendant and Appellant below, is a New Mexico corporation which is headquartered in Colorado and wholly owned by General Atomics, a privately held California corporation. No publicly traded company owns ten percent or more of the outstanding stock of General Atomics.

Exelon Corporation, a publicly traded corporation, owns Commonwealth Edison, which formerly owned Cotter Corporation. Exelon Corporation retains a financial interest in Cotter Corporation and in this litigation under the terms of Commonwealth Edison's 2000 sale of Cotter Corporation to General Atomics.

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IN THE

Supreme Court of the United States

No. 03-332

JOSEPH DODGE, individually and as personal representative of the Estate of Thelma Dodge, et al.,
Petitioners,
v.
COTTER CORPORATION
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' Statement Of The Case misstates and oversimplifies the proceedings below. For example, Petitioners assert that three jury verdicts were reversed by the Tenth Circuit, each on mere "procedural bases not related to the merits." Pet. 2. This is incorrect. The first verdict was reversed because the district court misapplied collateral estoppel and therefore erroneously directed the jury to find Respondent Cotter Corporation negligent. Pet. App. 8a. This decision cannot be characterized fairly as "not related to the merits." The next two verdicts were reversed in a consolidated appeal because at both trials the district court failed utterly to perform the "gatekeeping role" set forth in

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993). *Id.* at 31a. The Background Facts that follow show, time and again, that the district court itself questioned the reliability of Petitioners' proffered expert testimony, only to admit that testimony in the hope that the jury would sort out the issue of reliability. Although *Daubert* addresses a procedural rule, *i.e.*, Fed. R. Evid. 702, it is assuredly *not* "not related to the merits." As the Tenth Circuit correctly recognized, the improperly admitted expert evidence played a critical role in the trial and "was nothing short of essential to each of the plaintiffs' claims." *Id.* at 31a.

Petitioners make the expert testimony issue the centerpiece of their Petition. Yet Petitioners' Statement Of The Case provides no explication of the facts and proceedings giving rise to the issue. Petitioners do not explain that in the first appeal, the Tenth Circuit was so troubled by "the novelty of the medical causation theory here" and the quality of their experts' testimony, coupled with the district court's apparent failure to follow *Daubert*, that it specifically directed the district court on remand to "vigilantly make *detailed* findings to fulfill the gatekeeper role crafted in *Daubert*." *Id.* at. 23a-24a. Nor do Petitioners provide this Court with examples of the district court's rulings on key experts, which repeatedly reflect its dissatisfaction with the reliability of Petitioners' experts' testimony and its abdication of the gatekeeper function. For example, in assessing geologist Miller's testimony, the district court criticized his information concerning crucial environmental background levels of key chemicals, but let Mr. Miller testify nonetheless: "'I wish that the plaintiffs had some better information on background . . . Unfortunately,

they didn't. Now, if I don't give Mr. Miller a chance to show that this background is sufficient, basically the whole plaintiffs' case goes and we might as well just strike the trial. And I frankly don't want to do that.'" *Id.* at 22a.

As the following Background Facts reveal, Petitioners' arguments for certiorari are meritless.

BACKGROUND FACTS

1. The *Boughton* and *Dodge* Lawsuits.

In 1957, Cotter constructed a uranium mill on a site near Cañon City, Colorado (the "Mill"). Cotter began operations there the next year. *Id.* at 5a.

On September 1, 1989, approximately 532 residents of Lincoln Park, an unincorporated area approximately a mile and a half north of the Mill, sued Cotter, its parent corporation, and other defendants in the lawsuit styled *Boughton v. Cotter Corp.* ("*Boughton*"). *Id.* at 7a. The *Boughton* plaintiffs unrelated to the Petitioners here alleged negligence, trespass and nuisance related to Cotter's operation of the Mill, and also sought medical monitoring. *Id.* at 8a.

A bellwether trial with eight plaintiffs was held in January 1994. *Boughton v. Cotter Corp.*, 65 F.3d 823, 825 (10th Cir. 1995). The jury found that Cotter was negligent in all eight cases, but awarded monetary damages in only four cases, totaling $79,600, and denied medical monitoring to all

eight plaintiffs.[1] Pet. App. 9a. No non-economic or exemplary damages were awarded. *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1196 n.5 (10th Cir. 2000). The remaining *Boughton* plaintiffs thereafter settled with Cotter.

Petitioners here, 47 people who also claim to have resided in or around Lincoln Park, filed *Dodge v. Cotter Corp.* ("*Dodge*") in 1991, contending that they suffered from a wide range of physical maladies allegedly caused by exposure to toxic substances that Cotter negligently released from the Mill. Pet. App. 7a-8a. Petitioners, *Dodge* plaintiffs, also asserted claims for medical monitoring and trespass. *Id.* at 8a. *Dodge* was assigned to the judge presiding over *Boughton*. Pet. 2. The judge divided the *Dodge* plaintiffs into four separate trial groups. Aplt. App. at 016810-016812, 016819-016820.

2. *Dodge I* Proceedings.

In 1998, before the first *Dodge* trial, certain *Dodge I* plaintiffs moved for partial summary judgment, contending, among other things, that Cotter should be collaterally estopped from relitigating its negligence based on the *Boughton* verdict. Pet. App. 8a. The district court granted the motion, and applied the doctrine of collateral estoppel offensively to declare Cotter negligent as a matter of law. *Id.*

In accordance with its ruling, the district court instructed the jury in the *Dodge I* trial that Cotter was negligent. *Id.* In

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1/ Three plaintiffs prevailed on nuisance claims and six succeeded on trespass claims. 203 F.3d at 1196 n.5. The plaintiffs appealed the district court's refusal to certify a class and other adverse rulings. Pet. App. 8a. The Tenth Circuit affirmed the district court on each. *Id.*

June 1998, the jury returned a verdict for the *Dodge I* plaintiffs and Cotter appealed, challenging *inter alia* the collateral estoppel ruling and the district court's decision to permit plaintiffs' expert witnesses to testify under *Daubert*. 203 F.3d at 1197, 1200 n.12.

On February 11, 2000, the Tenth Circuit reversed and remanded for a new trial holding that the district court erred by applying collateral estoppel. Pet. App. 8a. The Tenth Circuit explained that, "[i]f *Boughton I* was to have been the test case in plaintiffs' effort to establish this toxic tort, greater care to assure the jury was properly instructed and the verdict forms were clear was essential to establish results impervious to relitigation." 203 F.3d at 1200.

The Tenth Circuit also addressed the district court's admission of plaintiffs' expert testimony, noting that,

> because the question of expert testimony is likely to recur, we would be remiss not to indicate our concern that the district court vigilantly make detailed findings to fulfill the gatekeeper role crafted in *Daubert* . . . Given the novelty of the medical causation theory here . . . it is essential that by specific findings of record the trial court assures the expert testimony . . . is relevant and reliable, and the 'particular opinion is based on valid reasoning and reliable methodology.'

Id. at 1200 n.12.

3. *Dodge II* Proceedings.

The next group of Petitioners, the *Dodge II* plaintiffs, was set for trial in October 2000, eight months after the Tenth Circuit's admonition requiring "detailed findings to fulfill the gatekeeper role." Pet. App. 8a.

a. The Petitioners' Expert Testimony.

The *Dodge II* plaintiffs offered as expert witnesses Mr. Glen Miller, Dr. Malin Dollinger, and Dr. Martyn Smith to opine on both exposure and causation. Pet. App. 20a-21a. The plaintiffs offered no evidence of exposure or causation other than the testimony of those three witnesses.[2]

i. Mr. Miller's Testimony.

Plaintiffs sought to admit the testimony of geologist Glen Miller to establish that the *Dodge II* plaintiffs' properties were contaminated by the presence of harmful substances derived from Cotter's mill, including uranium, molybdenum, arsenic, and lead. Pet. App. 20a. In reaching his conclusion that these substances emanated from Cotter's mill, Mr. Miller opined that the levels of those substances in soil, water and vegetation taken from some of the plaintiffs' properties far exceeded the baseline. *Id.* at 21a.

Mr. Miller, however, selected a world-wide average baseline, rather than baseline levels specific to the mineral

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2/ Dr. Michael Kelly testified on appropriate medical monitoring protocols. Dr. Kelly's testimony was premised, however, on Mr. Miller's opinion of exposure and on Dr. Dollinger's opinion of causation. Aplt. App. at 021723:4-5; 021778:23-25; 021783:5-21; 021786:9-15; 021722:19-021723:5; 021728:23-25; 021802:11-25; 021807:14-20.

rich State of Colorado or the uranium-rich area surrounding the Cotter mill (which is, of course, one reason why the mill was placed at that site).[3] *Id.* Mr. Miller's selected baseline derived from a 1966 English textbook ("*Bowen*") which established average baseline levels of such substances worldwide, rather than in any particular region. *Id.* Thus, *Bowen* consolidates and averages the level of the relevant substances from such far-flung regions as Great Britain, New Zealand, and sections of Africa.[4] *Id.* at 21a-22a.

At trial, two of Cotter's experts, both professors of geology at the Colorado School of Mines, testified that using a global average as a baseline is a scientifically unsound methodology. *See* Aplt. App. at 014194:20-014195:8; 015488:1-14; 015469:5-14; 026211:12-026212:1; 026353:15-026354:11. For example, samples collected by the United States Geological Survey from the groundwater in the Cañon City area over several decades averaged 100 times the world-wide baseline. *Id.* at 014224:2-10; 014226:13-014227:8; 020113:19-020114:13; 020124:25-020126:1.

ii. Dr. Dollinger's Testimony.

Relying on Mr. Miller's testimony, Dr. Dollinger would opine not only that the *Dodge II* plaintiffs were "substantially exposed" to toxic substances but also that their subsequent

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3/ This was Miller's first attempt to assess whether an industrial facility contaminated a community above natural baseline levels. Aplt. App. at 012110:22-012111:1; 020117:7-16.

4/ Miller also relied upon a single vegetation baseline, rather than one specific to the particular vegetation he was sampling. Aplt. App. at 012011:13-17; 012068:7-9; 020083:3-13; 030646; 030648; 030650.

illnesses must have derived from the exposure. *Id.* at 011541:13-011542:3; 012228:12-17; 011534:1-7. Dr. Dollinger, an oncologist, asserted that the alleged exposure (for which he could not establish a dose or exposure amount) caused such conditions as arthritis, general aches and pains, and endometriosis. *Id.* at 021038:13-19; 020949:7-020951:8; 020952:6-020957:3; 021044:13-17; 020861:17-020862:4; 020868:8-17; 011686:8-15. He could not, however, identify a single literary source (medical or scientific) linking exposure (in any amount) to these illnesses. *Id.* at 011775:1-8. Instead, Dr. Dollinger relied upon three articles:

(i) the "Walravens" study, the author of which testified for Cotter that his research had determined there was ***no*** link between molybdenum exposure and adverse health effects;

(ii) a 1961 Armenian study that the National Academy of Sciences had labeled speculative; and

(iii) a case report that Dr. Dollinger admitted he had not actually reviewed.

Id. at 011780:9-24.

iii. Dr. Smith's Testimony.

The *Dodge II* plaintiffs also sought to admit the testimony of Dr. Smith, a toxicologist, to establish a connection between the alleged exposure and the plaintiffs' alleged injuries and illnesses. Pet. App. 20a-21a. As with Dr. Dollinger, Dr. Smith relied on Miller's findings to conclude that plaintiffs were significantly exposed, even though Dr. Smith acknowledged that he did not know how much molybdenum was ingested, inhaled, or otherwise

absorbed into any of the plaintiffs' bodies. *Id.* at 011541:13-011542:3; 012228:12-17; 012189:10-15, 012256:10-24.

Dr. Smith reasoned that because the plaintiffs had conditions which he concluded may be caused by exposure to toxic substances, those conditions must have been caused by such exposure. Accordingly, Dr. Smith attributed such diverse ailments as infertility[5], "thermal stress," memory loss, migraine headaches, fatigue, diarrhea, bony exostoses, and joint deterioration to the plaintiffs' exposure. *Id.* at 012249:10-15; 012221:8-13, 012184:14-012188:16. In addition to his own purported research,[6] Dr. Smith relied upon the same three articles as Dr. Dollinger. *Id.* at 012280:20-012285:20; 011780:9-24.

b. *Daubert* Motion Proceedings Before The District Court.

Cotter moved to exclude six of the plaintiffs' proposed experts, including Mr. Miller, Dr. Dollinger, and Dr. Smith, on the grounds that their testimony was unreliable and inadmissible under *Daubert*. Pet. App. 9a.

5/ Dr. Smith admitted that "There have been very few studies on the effects of molybdenum on human beings, and I don't recall any that report a fertility problem in males." Aplt. App. at 012218:9-012219:5.

6/ Dr. Smith's research a study of the effect of molybdenum in mice did not support his testimony. Although he testified that harmful effects begin after exposure to 1,000 micrograms of molybdenum, his research involved giving mice the human equivalent of 14,000,000 micrograms of molybdenum. Even at that level, his research netted inconclusive results as to whether humans would experience adverse effects from such exposure. Aplt. App. at 012286:5-23.

In support of the motion, Cotter filed a forty-seven page brief and an appendix of several thousand pages of reports and articles. *Id.* at 19a. The district court rejected Cotter's motion, and instead limited Cotter to a brief of twenty pages with no more than twenty pages of exhibits. *Id.* at 29a. The district court denied a subsequent motion by Cotter for leave to file a lengthier appendix "finding that 'such material is prolix,'" and that twenty pages was "'sufficient.'" *Id.* at 19a.

At Cotter's request, the district court agreed to hold a *Daubert* hearing. *Id.* at 29a. Before the hearing, the district court informed the parties that its rulings "'are going to be very similar, if not the same, as [the *Dodge I*] rulings . . . except in the areas where the Court of Appeals [found] error.'" *Id.* at 19a-20a.

Consistent with its stated intention to admit the experts and limit its review of briefing and written materials, the district court refused to allow any live witness testimony at the *Daubert* hearing, over Cotter's objection. *Id.* at 20a. Instead, the district court questioned counsel, often with questions that were better answered by the experts themselves. *Id.*

At the hearing, the district court specifically professed its skepticism of the reliability of the proffered testimony, particularly the methodology employed by Miller, whose opinions undergird those of Drs. Dollinger and Smith:

> 'Let me just be very candid with you. I wish that the plaintiffs had some better information on background. I think it would be much better if they had; if they had even gone out and done some tests

> in the surrounding areas, rather than rely on Bowen. What is the level in Europe or Israel or South Africa, it seems to me is not that critical.
>
> Unfortunately, they didn't. Now, if I don't give Mr. Miller a chance to show that this background is sufficient, basically the whole plaintiffs' case goes and we might as well just strike the trial. And I frankly don't want to do that. I think the plaintiffs should have some opportunity to present their case to the jury.'

Id. at 22a.

The district court reserved ruling on admission until trial. *Id.* at 22a-23a. With the exception of its criticism of Miller's methodology, the court made no specific, detailed findings on the reliability of the experts' testimony. *Id.* at 22a-23a.

At trial, with the jury already empaneled, the district court held an in camera voir dire for each contested expert. *Id.* at 23a. The court admitted the experts' testimony, but failed to make any specific findings as to the reliability of their methodology or conclusions. *Id.* at 24a. Instead, the court focused solely on the credentials of the proffered experts. *Id.* at 27a.

Regarding Mr. Miller, the court stated: "'There certainly are problems here, a lot of problems, concerning water, concerning vegetation, and the differences. But what I have heard is that Mr. Miller is certainly a well-qualified geologist, got his degree in Wyoming, has a great deal of experience.'" *Id.* at 24a. After referencing the studies Miller relied upon

the district court concluded that, "'I think that the problems that exist with differences can be covered by cross-examination.'"[7] *Id.* at 25a.

In admitting the testimony of Dr. Dollinger the court again focused upon the credentials of the proffered expert, referencing Dr. Dollinger's "'very fine education . . . and other excellent background,'" that "'he treats patients with cancer and other diseases'" and had "'reviewed medical literature'" related to causation. That Dr. Dollinger expressed a "'minority view . . . does not mean that he is not qualified as an expert.'" *Id.* at 26a.

Finally, the district court recited Dr. Smith's methodology, but made no specific findings as to its reliability. Dr. Smith was admitted because

> 'there has been a showing that he is undisputably an expert in the area of toxicology. It's been indicated that his methodology is the same as the methodology that is used in nonlitigation cases . . . He has apparently done research, himself, on heavy metals. He teaches doctors about toxicology, and the plaintiff is conceding that there is no study in risk exposure . . . So the Court will overrule the objections, the *Daubert* objections as to Dr. Smith, and we'll see how it goes.'

Id. at 28a.

7/ Because Miller had no baseline level for dust exposure whatsoever, the court stated that he may not testify concerning dust. Pet. App. 25a.

c. *Dodge II* Verdict And Appeal.

The *Dodge II* jury found that Cotter was negligent but that Cotter had not caused any of the Plaintiffs' alleged physical injuries and illnesses. *Id.* at 9a. The district court accordingly entered judgment for Cotter on the negligence claims. *Id.* Separately, the jury returned a verdict for ten plaintiffs on the issue of medical monitoring and for eleven plaintiffs on the trespass issue (awarding $42,501 total on the trespass claims). *Id.* Notwithstanding the jury's verdict, the district court, acting *sua sponte*, entered judgment on medical monitoring for ***all*** plaintiffs, and assessed monitoring of $241,300 (with interest, the total award was approximately $300,000). *Id.*

Cotter appealed to the Tenth Circuit, arguing that the district court failed to perform its gatekeeper function as required by *Daubert* and erred in admitting the expert testimony, among other contentions. *Id.* Cotter requested, and obtained, a stay of the appeal pending resolution of *Dodge III*. *Id.* at 56a-57a.

4. *Dodge III* Proceedings.

In May 2001, the district court, over Cotter's objection, consolidated the remaining groups of *Dodge* plaintiffs, including the plaintiffs from *Dodge I*, whose case the Tenth Circuit had remanded for retrial. *Id.* at 10a.

In advance of this final trial, the district court granted the *Dodge III* plaintiffs' motion for offensive collateral estoppel on the issue of negligence. *Id.* Relying upon the jury verdict in *Dodge II*, the district court again instructed the jury that Cotter was negligent as a matter of law. *Id.* at 32a.

With one exception, each of the experts testifying for plaintiffs in *Dodge III* had testified in *Dodge II*. *Id.* at 10a. Accordingly, the district denied Cotter's motion for a *Daubert* hearing, except for the newly introduced expert, Dr. Harry Demopoulos. Aplt. App. at 019027; 020186. At the *Daubert* hearing, the court again heard only from counsel. *Id.* at 021319:19-021340:10. Over Cotter's objection, all of the experts were permitted to testify at the *Dodge III* trial. Pet. App. 32a-33a.

The *Dodge III* jury, unlike the *Dodge II* jury, found that Cotter's negligence had caused plaintiffs' injuries and returned verdicts in favor of all but one plaintiff on the negligence claim, in favor of 13 plaintiffs on the trespass claims and in favor of 27 plaintiffs for negligence requiring medical monitoring. *Id.* at 10a. The jury also awarded 26 plaintiffs punitive damages. *Id.*

The district court issued a judgment on July 6, 2001, which left open the amounts for medical monitoring and costs, and the assessment of prejudgment interest. Aplt. Att. O. The district court invited briefing on those issues. *Id.* On September 10, 2001, the district court denied Cotter's post-trial motions and determined the awards for costs and medical monitoring. Aplt. Att. S, T. The court entered those awards in a November 20, 2001 judgment, wherein the court also established the total prejudgment interest. Aplt. Att. U. The district court expressly referred to the November 20, 2001 judgment as setting the time for Cotter to appeal. *Id.* Cotter appealed the verdict, again citing the district court's failure to fulfill its gatekeeper function under *Daubert*. Aplt. Att. V. Thus the stage was set for consolidation and resolution of the *Dodge II* and *Dodge III* appeals.

REASONS FOR DENYING THE PETITION

I. The Tenth Circuit's Standard Of Review Creates Neither An Issue Of National Importance Nor A Significant Legal Question.

The procedural history of this case makes it unique. Concerned about "'the novelty of [Petitioners'] medical causation theory here,'" Pet. App. 24a., and the district court's failure in the first trial to make any express findings reflecting the reliability of plaintiffs' proffered expert testimony, the Tenth Circuit specifically directed the district court on remand to "vigilantly make detailed findings to fulfill the gatekeeper role crafted in *Daubert*." *Id.* at 23a-24a. The district court then conducted two trials for separate groups of Petitioners, but when those judgments came up for appellate review, the Tenth Circuit searched both records in vain for the detailed findings concerning reliability that it had directed the district court to make:

> Upon reviewing the record, we reluctantly conclude that the district court did not perform its gatekeeper function with respect to plaintiffs' experts Mr. Miller, Dr. Dollinger and Dr. Smith and thereby abused its discretion by admitting their testimony. Faced with an exceedingly difficult, complex case and obvious docket pressures, the court did not make adequate findings on the record to assure that the expert testimony offered was both relevant and reliable, and that the particular opinions were based on valid reasoning and reliable methodology.

Id. at 23a.

There is nothing remarkable about this ruling. This Court has repeatedly emphasized that a district court has an obligation to exercise its gatekeeper function. *See Daubert*, 509 U.S. at 589, 597; *General Electric Co. v. Joiner*, 522 U.S. at 136, 142 (1997), *Kumho Tire Co., Ltd v. Carmichael*, 526 U.S. 137 (1999). Performance of this gatekeeper function is mandatory, not discretionary. *Daubert* held that, when

> [f]aced with a proffer of expert scientific testimony, then, the trial judge *must* determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether [it] can be applied to the facts in issue.

509 U.S. at 592 (emphasis added). Although the district court has "latitude" in "*how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability," *Kumho Tire*, 526 U.S. at 152, performing this function remains an "obligation." *Id.* at 141. As three members of this Court noted, *Kumho Tire* "makes clear that the discretion it endorses trial-court discretion in choosing the manner of testing expert reliability is not discretion to abandon the gatekeeping function." *Id.* at 158-59 (Scalia, J., concurring).

Petitioners attempt to create an issue worthy of certiorari by pointing to what they call the Tenth Circuit's "hybrid de novo" standard of review for *Daubert* rulings. Pet. 5. True,

the Tenth Circuit does "review de novo the question of whether the district court applied the proper standard and actually performed its gatekeeper role in the first instance." Pet. App. 17a. But this is unremarkable; surely if a district court were to apply the old standard of *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), for example, that court's ruling would be reversed for legal error.[8] Not one of the cases Plaintiffs collect as evidence of a conflict take issue with the notion that application of an improper standard constitutes an error of law. Pet. 8-13 n.10.

Beyond that, the Tenth Circuit "review[s] the trial court's actual application of the standard in deciding whether to admit or exclude an expert's testimony for abuse of discretion." Pet. App. at 17a. Significantly, a review of the Tenth Circuit's opinion establishes beyond question that it resolved this case on the abuse of discretion standard. Nowhere in its opinion does the Tenth Circuit specify an error of law by the district court. Throughout its opinion, however, the Tenth Circuit highlights the abuses of discretion that caused it to reverse and remand. As to the *Dodge II* appeal, the Tenth Circuit stated: "Upon reviewing the record, we reluctantly conclude that the district court did not perform its gatekeeper function with respect to plaintiffs' experts Mr. Miller, Dr. Dollinger and Dr. Smith *and thereby abused its discretion by admitting their testimony*." *Id.* at 23a (emphasis added). The Tenth Circuit then supports that conclusion by going through the district court's rulings for each witness and explaining how each such ruling fails to

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8/ The distinction is semantic, in any event. A district court has no discretion to apply incorrect law, so legal errors constitute abuses of discretion.

address the crucial *Daubert* issue of the reliability of the proffered expert testimony. *Id.* at 23a-28a.

Plaintiffs also contend that the Tenth Circuit conducted "a de novo review of the trial court's lengthy *Daubert* procedures." Pet. 6. This too is incorrect. The Tenth Circuit noted "that a district court exercises significant discretion in deciding how to perform its gatekeeper role." Pet. App. 29a. The Tenth Circuit noted also that "a district court has discretion to limit the information upon which it will decide the *Daubert* issue," and recognized that it "review[s] the exercise of that discretion for its abuse." *Id.*

The Tenth Circuit then carefully reviewed the manner in which the district court exercised its discretion in how to conduct its role as gatekeeper, by: rejecting complete submissions and expert reports; limiting the length of any *Daubert* brief and appendix to 20 pages; refusing to take live testimony from the experts themselves; holding only a brief non-testimonial hearing and asking the lawyers questions only the experts could answer; and truncating the voir dire of the experts at trial. *Id.* at 29a-30a. Recognizing that any one of these limitations might be acceptable under certain circumstances, the Tenth Circuit stated: "taken together, these decisions placed an unreasonable limitation on the information available to the court and in our view exceeded the bounds of permissible choice." *Id.* at 30a. Ultimately, the Tenth Circuit concluded that the district court's inadequate findings on the crucial issue of reliability precluded it from concluding that the district court acted within its discretion in limiting the *Daubert* proofs: "we do not have before us the findings required to determine definitely if the court abused its discretion by so limiting the

evidence. However, from the record we do have before us, taken as a whole, *we would be inclined to conclude that the district court did abuse its discretion*." *Id.* at 30a-31a (emphasis added). Thus, despite Plaintiffs' contention to the contrary, this was not de novo review.

Finally, the Tenth Circuit addressed the issue of the expert witnesses at the *Dodge III* trial. *Id.* at 32a-33a. The district court had refused to hold new hearings in *Dodge III* on the experts who had testified in *Dodge II*. *Id.* Hence the Tenth Circuit ruled that, "for the reasons discussed at length above, *we conclude that the district court abused its discretion* in *Dodge III* by admitting the testimony of Mr. Miller, Dr. Dollinger and Dr. Smith." *Id.* at 33a (emphasis added).

Beyond question, the Tenth Circuit reviewed the district court's *Daubert* rulings for abuse of discretion. That the Tenth Circuit held the district court abused its discretion is no basis for certiorari.

II. The Tenth Circuit's Exercise Of Its Discretion To Remedy The District Court's Error Was Specific To This Case And Invokes No Issues Of National Significance.

Petitioners' second question, which asks this Court to review the particular remedy adopted by the Tenth Circuit in this case, i.e., that of a new trial, does not warrant certiorari. *Id.* at 31a. Petitioners' attempt to spin the case-specific remedy into a broad principle or a conflict with other circuits is without merit.

The Tenth Circuit's decision to remand for a new trial was set against the backdrop of the particular circumstances of this case. Recognizing that "the testimony of these experts was nothing short of essential to each of the plaintiffs' claims," *id.*, a fact that Petitioners do not dispute, the Court found that the decision to admit this expert testimony without employing the necessary gatekeeper function could not be harmless error. *Id.*

The district court also recognized that this expert testimony was essential to plaintiffs' claims. Indeed, that very fact motivated its erroneous ruling in the first place:

> 'I wish that the plaintiffs had some better information on background . . . Unfortunately they didn't. Now, if I don't give Mr. Miller a chance to show that this background is sufficient, basically the whole plaintiffs' case goes and we might as well just strike the trial. And I frankly don't want to do that.'

Id. at 22a. In light of this ruling, the argument that this Court should grant certiorari to compel the Tenth Circuit to give the district court a chance to create a post hoc justification for its ruling is frivolous.[9]

The Tenth Circuit was mindful of the effect a new trial would have on judicial resources: "Given the vast investment of resources in this case by both parties and by the federal judiciary, we are reluctant to render a decision that will

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9/ As Petitioners note, Pet. 14 n.12, the trial judge has recused herself from this case, which is now on a different judge's docket, making the relief requested by Petitioners impractical as well as improper.

further delay a final resolution." *Id.* at 31a. But the appellate court decided that the temptation to justify admitting this expert testimony outweighed, at least in this case, the appellate court's concern for judicial economy. "[W]e think no district court would be well positioned to make valid findings given the overwhelming temptation to engage in post hoc rationalization of admitting the experts." *Id.* The court responsibly recognized, as a sister circuit had held, that "'[a] post-verdict analysis does not protect the purity of the trial, but instead creates an undue risk of post-hoc rationalization. This is hardly the gatekeeping role the Court envisioned in *Daubert* and its progeny.'" *Id.* at 32a, citing *Mukhtar v. California State Univ.*, 319 F.3d 1073, 1074 (9th Cir. 2003), *amending* 299 F.3d 1053, 1066 (9th Cir. 2002).

Congress has endowed the appellate courts with broad discretion to fashion a remedy as justice requires under the particular circumstances of each individual case.

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had ***as may be just under the circumstances***.

28 U.S.C. § 2106 (West 2003) (emphasis added). The Tenth Circuit properly exercised this discretion in refusing to permit a post-trial application of the gatekeeper function.

Furthermore, the Tenth Circuit's exercise of discretion in this particular case creates no conflict among the circuits. *See* Pet. at i,15. Petitioners do not cite a single *Daubert*-

related case, let alone one so factually identical as to conflict with the Tenth Circuit's case-specific remedy. Instead, Petitioners cite one case noteworthy for the complete absence of an underlying trial[10] and another in which the appellate court remanded to the Department of Agriculture where the agency had not fully articulated its standard for interpreting the relevant act.[11] *Id.* at 15. Neither case involved the particular concerns that motivated the Tenth Circuit's choice of remedy here. Hence, there is no reason for this Court to review that choice of remedy.

III. Petitioners' Jurisdictional Argument Is Predicated On Omissions Of Key Facts And A Misstatement Of The Tenth Circuit's Holding.

A. Petitioners Ignore That The July 6, 2001 Judgment Did Not Set The Amount Of Costs Or Medical Monitoring.

Petitioners premise their jurisdictional argument on the assertion that the district court's July 6, 2001 Judgment left only the calculation of pre- and post-judgment interest for future resolution (and thus was final and appealable). *Id.* at 18-21. This assertion is simply untrue.

In its July 6 Judgment, the district court awarded not only interest, but also medical monitorings and costs two

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10/ *Fort Knox Music Inc. v. Baptiste*, 203 F.3d 193, 196 (2d Cir. 2000) (appeal from judgment on the pleadings).

11/ *Norinsberg v. United States Dept. of Agric.*, 162 F.3d 1194, 1996 (D.C. Cir. 1998) (remanding for articulation of "factors relevant in interpreting 'actively involved'" as used in the Agricultural Commodities Act, 7 U.S.C. § 499a(b)(9)).

matters Petitioners wholly omit from their recitation of the procedural history. *See Id.* at 18, Pet. App. 63a. The July 6 Judgment expressly directed plaintiffs to file a Bill of Costs and to brief the issue of medical monitoring. Pet. App. 63a. Unlike the prejudgment interest, the amounts of costs and of medical monitoring were not calculable based on any statutory rate or formula. Rather, the final amount awarded on each was left to the discretion of the district court. Aplt. Att. P. at 3. Indeed, assessing those amounts was no mere ministerial task the parties hotly contested the amount of the awards, whether medical monitoring awards should be put into a trust or given directly to Petitioners, and whether Petitioners were entitled to have attorney's fees paid from the awards.

The district court's July 6 Judgment was not a final judgment for purposes of Rule 58 because the court left the remedy partially undetermined upon its entry. *See Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976) (summary judgment order which did not assess damages or other relief was not final). As Judge Friendly wrote, an order "adjudging liability but leaving the quantum of relief still to be determined has been a classic example of non-finality and non-appealability from the time of Chief Justice Marshall to our own." *Taylor v. Board of Educ.*, 288 F.2d 600, 602 (2d Cir. 1961).

In fact, the district court did not actually enter judgment on specific amounts for costs or medical monitoring until the November 20, 2001 Judgment from which Respondent appealed. On August 6, 2001, as requested by the district court, both parties filed briefs addressing the issue of costs and medical monitoring. On September 10, 2001, the district

court entered an order that determined the amounts to be awarded for costs and for medical monitoring, and further stated that because the "'only remaining issue before the Court concerns interest,' it would 'amend the judgment to reflect the award of costs and medical monitoring ***once the parties have submitted their calculations concerning interest on the personal injury and trespass awards.***'" Pet. App. 12a (quoting district court's September 10, 2001 Order) (emphasis added)). Thus, the district court expressly left the actual entry of final judgment on medical monitoring and costs until it affixed the prejudgment interest.[12]

On November 20, 2001, the district court entered a final judgment that disposed of all outstanding issues, including amounts awarded in prejudgment interest, medical monitoring, and costs. Aplt. App. U. The district court clearly intended this to be the final appealable judgment, as it stated that "the execution of the judgment in this case is stayed until defendant's time for filing an appeal has expired (that is, 30 days from the date of **this** Final Judgment)." Pet. App. 73a (emphasis added).

12/ The September 10 order did not constitute the final judgment and Petitioners do not contend otherwise. That order did not comply with the requirements for a judgment as set forth in Fed. R. Civ. P. 58: "Every judgment . . . must be set forth on a separate document." Fed. R. Civ. P. 58(a). A judgment is effective only when so set forth and when entered as provided in Rule 79(a). *Id.* at 58(b)(2). That order determined the amounts Petitioners were entitled to recover on their medical monitoring claims, only after discussing the parties' competing legal arguments. Aplt. Att. T. Not until November 20, 2001, did the district court enter a judgment that satisfied the separate document requirements of Rule 58.

B. Petitioners Misstate The Tenth Circuit's Holding.

Petitioners premise their request for certiorari on this issue upon the Tenth Circuit's supposed divergence from the Fourth and Sixth Circuits, characterizing the Tenth Circuit's rejection of their argument as based solely upon the prejudgment interest awarded but not calculated in the July 6, 2001 Judgment. But to make this argument, Petitioners must and do omit language from the Court's opinion that is contrary to their presentation of the facts and their characterization of the appellate court's opinion. Petitioners strategically place an ellipsis on line 6 of their block quote. Pet. 19. Re-inserting the omitted language, however, reveals that the appellate court clearly relied upon more than the uncalculated prejudgment interest in determining that the July 6, 2001 Judgment was not a final and appealable order. With the omitted language emphasized, the section of the Tenth Circuit's opinion relied upon by Petitioners reads:

> Here, a final judgment was not entered until November 20, when the district court set forth a sum certain for every part of the award, including prejudgment interest. It is clear that the July 6 directive, although titled a "Judgment," was not a final decision under § 1291 ***because neither the medical monitoring award nor the prejudgment interest were finally determined.*** Prejudgment interest is a portion of the damages and thus is an integral part of the merits decision. *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175-76 & n. 3, 109 S. CT. 987, 103 L. Ed. 2d 146 (1989); *Garcia v. Burlington N.R. Co.*, 818 F.2d 713, 721 (10th Cir.

> 1987). Here, the determination of prejudgment interest was pending until November 20, which is the date the decision in this case became final. Accordingly, Cotter's notice of appeal was timely and we therefore have appellate jurisdiction.

Pet. App. 13a-14a.

Petitioners' contention that the Tenth Circuit made its decision based solely upon the outstanding prejudgment interest is patently incorrect. Petitioners' circuit split is pure fiction. There is no basis for a grant of certiorari here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October 6, 2003

(4)

Supreme Court, U.S.
FILED
OCT 2 1 2003
OFFICE OF THE CLERK

No. 03-332

IN THE

Supreme Court of the United States

JOSEPH DODGE, individually and as personal representative of the Estate of Thelma Dodge, *et al.*,
Petitioners,

v.

COTTER CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Cotter Corporation, Defendant and Appellant below, is a New Mexico corporation which is headquartered in Colorado and wholly owned by General Atomics, a privately held California corporation. No publicly traded company owns ten percent or more of the outstanding stock of General Atomics.

Exelon Corporation, a publicly traded corporation, owns Commonwealth Edison, which formerly owned Cotter Corporation. Exelon Corporation retains a financial interest in Cotter Corporation and in this litigation under the terms of Commonwealth Edison's 2000 sale of Cotter Corporation to General Atomics.

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RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

ARGUMENT

Pursuant to Supreme Court Rule 15.8, Respondent Cotter Corporation files this Supplemental Brief to call this Court's attention to the Tenth Circuit's decision in *Goebel v. Denver & Rio Grande Western Railroad Company*, No. 02-1391, 2003 WL 22311330 (10th Cir. Oct. 9, 2003) ("*Goebel II*"), which issued three days after Cotter filed Respondent's Brief in Opposition. *Goebel II* also applies the standard used by the Tenth Circuit in this case concerning appellate review of a district court ruling pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Goebel II* demonstrates beyond peradventure the strict propriety of the Tenth Circuit's *Daubert* standard.

In *Goebel v. Denver & Rio Grande Western Railroad Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000) ("*Goebel I*"), the Tenth Circuit had reversed a judgment for plaintiff entered after a jury trial because the district court had failed to exercise the gatekeeper function. On remand, the district court denied defendant's motion for an evidentiary hearing on the *Daubert* issues, but "took pains to 'demonstrate by specific findings on the record that it ha[d] performed its duty as gatekeeper.'" *Goebel II*, 2003 WL 22311330, at *2 (quoting *Goebel I*, 215 F.3d at 1088). The district court concluded that plaintiff's expert's testimony was admissible, and the parties stipulated to a judgment in the amount of the first trial so that defendant could appeal that ruling promptly.

What makes *Goebel II* so instructive is the fact that "[n]either party argue[d] that the district court ha[d] again failed to perform its gatekeeper function." *Goebel II*, 2003 WL 22311330, at *2. What remains, then, is the Tenth Circuit's review of the district court's resolution of the question of reliability – precisely the ultimate focus of the Tenth Circuit's decision below in this case.

Plaintiffs argue that the Tenth Circuit's de novo review of *what* legal standard is applied somehow taints the Tenth Circuit's review of *how* the district court applied that standard -- as plaintiffs' supporting amici put it, "the Tenth Circuit opinion in *Dodge* applies a 'de novo' standard to not just *whether* the district court performed the gatekeeper function, but *how* it did so." Amicus Br. at 3 (emphasis in original). In *Goebel II*, only the "*how* it did so" is at issue, thus revealing clearly the Tenth Circuit's standard for reviewing that question.

In *Goebel II* the Tenth Circuit states time and again – with cites to its opinion in this case, *Dodge v. Cotter Corp.*,

328 F.3d 1212 (10th Cir. 2003), each time – that it defers to the district court's broad discretion. First, the *Goebel II* opinion states:

> The trial court's broad discretion applies both in deciding how to assess an expert's reliability, including what procedures to utilize in making that assessment, as well as in making the ultimate determination of reliability. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); *Dodge*, 328 F.3d at 1223.

2003 WL 22311330, at *1. Then *Goebel II* continues:

> Accordingly, we will not disturb the district court's ruling unless it is "arbitrary, capricious, whimsical or manifestly unreasonable" or when we are convinced that the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Dodge*, 328 F.3d at 1223 (internal citation omitted).

Id. Finally, *Goebel II* reiterates:

> As we stated above, our review is deferential – only if we are convinced that the district court "made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances" will we disturb its ruling. *Dodge*, 328 F.3d at 1223 (internal citation omitted). Despite our expertise on the law, our role as judges is not to second-guess well qualified and highly trained medical experts

> on difficult judgment calls within their field of expertise; our role is merely to ensure that the district court did not abuse its discretion by concluding that the expert testimony in this case was admissible under the standards outlined above.

Id. at *5. That the Tenth Circuit adheres rigorously to *Daubert* cannot be gainsaid.

In the end, *Goebel II* affirms the district court's *Daubert* conclusion. The reason *Goebel II* reaches a conclusion different from that below is made clear by comparing the Tenth Circuit's two detailed decisions. *Goebel II* reveals how the district court in that case addressed the issue of reliability and made detailed findings on that issue. *See Goebel II*, 2003 WL 22311330, at *6-*10. In contrast, *Dodge* reveals how the district court in this case focused only on the experts' qualifications and abandoned the issue of reliability in its entirety to the jury. Pet. App. 23a-31a.

Goebel II undermines another argument for certiorari, raised primarily by plaintiffs' supporting amici. Amici contend that the Tenth Circuit's standard "will significantly increase the strain on judicial resources, requiring, as it seems, some sort of mandatory trial before trial" thus "mak[ing] prosecuting cases prohibitively expensive." Amicus Br. at 7. The Tenth Circuit's *Dodge* opinion, of course, indicates that evidentiary hearings will not become necessary in every case. Pet. App. 29a. *Goebel II* proves that point; it involves the denial of a request for such a hearing by the district court, a ruling so obviously correct that defendant did not even challenge it on appeal. This "floodgates" argument holds no water.

CONCLUSION

As *Goebel II* highlights, the Tenth Circuit's application of *Daubert* is in accordance with the teachings of this Court and creates no conflict among the circuits. For the reasons set forth above and in Respondent's Brief in Opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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BRIEF OF THE AMICI CURIAE

The States of New Mexico, Oklahoma and Wyoming by their Attorneys General, Patricia A. Madrid, New Mexico, W. A. Drew Edmondson, Oklahoma and Patrick Crank, Wyoming, respectfully submit their brief as amici curiae through their respective Attorneys General pursuant to Supreme Court Rule 37.4. The Amici States address the standard of review to be applied in determining whether a district court satisfied its gatekeeper function under *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1999).

STATEMENT OF INTEREST OF AMICI CURIAE

The Attorneys General of the States of New Mexico, Oklahoma and Wyoming are charged with the duty and responsibility of enforcing the laws and protecting the legal interests of the citizens of their respective states. As the chief legal enforcement officers of their states, each Attorney General must carefully calculate and husband the resources available to prosecute properly civil and criminal actions.

The decision of the Tenth Circuit panel in *Dodge v. Cotter Corp.*, 328 F.3d 1212 (10th Cir. 2003) opens the door for a state's adversaries to demand carte blanche procedures tantamount to a mini-trial on the admissibility of expert witness testimony. If left unchecked, the Tenth Circuit opinion will work an unfair and prejudicial hardship on governmental agencies responsible for enforcing the law and will make litigating complex cases prohibitively expensive.

By engaging in a hybrid de novo review of *Daubert* procedures, the Tenth and Seventh Circuits have departed from the standard established by this Court regarding the role to be performed by district courts in controlling the presentation of expert witness testimony at trial. This Court needs to resolve the conflict that now exists between the circuits on the standard by which a trial judge's conduct as gatekeeper under *Daubert* will be reviewed on appeal. The Amici States respectfully request that the Court grant the Petition for Writ of Certiorari to review a question that is of utmost importance to the administration of justice in all the states.

SUMMARY OF ARGUMENT

The Tenth Circuit decision in *Dodge* and the Seventh Circuit's opinions in *Chapman v. Maytag Corp.*, 297 F.3d 682 (7th Cir. 2002) and *U.S. v. Allen*, 269 F.3d 842 (7th Cir. 2001) conflict with the other reporting circuits, which apply a straightforward abuse of discretion review.[1]

[1] *See e.g.*, *U.S. v. Lopez-Lopez*, 282 F.3d 1, 14 (1st Cir. 2002); *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 210 F.3d 1, 15 (1st Cir. 2000); *Campbell ex rel. Campbell v. Metropolitan Prop. & Cas. Ins. Co.*, 239 F.3d 179, 185 (2d Cir. 2000); *Stecyk v. Bell Helicopter Textron, Inc.*, 295 F.3d 408, 415 n.3 (3d Cir. 2002); *Oddi v. Ford Motor Co.*, 234 F.3d 136, 153-54 (3d Cir. 2000); *TFWS, Inc. v. Schaefer*, 325 F.3d 234, 240 (4th Cir. 2003); *U.S. v. Rubio*, 321 F.3d 517, 525 (5th Cir. 2003); *Clay v. Ford Motor Co.*, 215 F.3d 663, 666-67 (6th Cir. 2000); *Kudabeck v. Kroger Co.*, ___ F.3d ___, 2003 WL 21781920 at *3-*6 (8th Cir. 2001 Aug. 4, 2003); *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 928-29 (8th Cir. 2001); *U.S. v. Hankey*, 203 F.3d 1160, 1167-69 (9th Cir. 2000); *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1312 (11th Cir. 2000); *U.S. v. Williams*, 212 F.3d 1305, 1308 (D.C. Cir. 2000).

Moreover, this Court in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), and *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), held that specific forms of hearings and live witness testimony are not necessary to satisfy the district court's gatekeeper role under *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

The Tenth and Seventh Circuit's new construction of the requirements of *Daubert* and the reversal de novo of the trial court's process of conducting a pretrial *Daubert* hearing and making detailed *Daubert* findings will work a substantial hardship on governmental entities in their roles as enforcers of federal environmental laws such as the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. (CERCLA or Superfund), and other laws designed to protect the public interest.

ARGUMENT

I. The Tenth Circuit Improperly Applied De Novo Review to "How" the District Court Performed its Gatekeeper Task under *Daubert*

On its face, the Tenth Circuit opinion in *Dodge* applies a "de novo" standard to not just *whether* the district court performed the gatekeeper function, but *how* it did so, in apparent contradiction to this Court's authority under *Daubert* and its progeny. The Tenth Circuit opinion will impact the method that governments charged with enforcement of environmental and other laws prosecute such cases, and fails to give adequate guidance to federal district courts on proper handling of the very important *Daubert* expert issues in such cases.

The Tenth Circuit asserts:

> Even had the district court performed its gatekeeper function, on this record we would be inclined to conclude that the court abused its discretion by unreasonably limiting the evidence upon which to base the decision
>
> . . . .
>
> Concluding that the [defendant's *Daubert*] motion [in limine] violated local court rules regarding length, the district court returned the motion and accompanying [several thousand page] appendix and allowed Cotter to file a revised motion and appendix, neither of which could exceed 20 pages in length. . . . At the [pretrial] *Daubert* hearing . . . citing Cotter's failure to notify the court of this intention . . . the court refused to allow any live witness testimony. [The district Court] insisted on the exclusive use of argument and proffers at the *Daubert* hearing . . . [which] lasted just over four hours . . . [and thereafter conducted an] in camera voir dire of each expert at trial [before ruling on admissibility]. . . .

Dodge, 328 F.3d at 1223, 1224, 1228.

The Tenth Circuit does not provide any guidance on what procedures will be acceptable in the future for the district courts and prosecutors to successfully comply with the Tenth Circuit's *Daubert* requirements, under an abuse of discretion review. The *Dodge* opinion can be read to *require* even more extensive hearings pretrial with unlimited live witnesses and without proscribed limits on the size of briefs and other materials filed with the court. *Dodge* could be used to justify virtually unchecked *Daubert* hearings pretrial, on pain of reversal for abuse of

discretion. This opinion is, consequently, of very serious concern for law enforcement officials in both the criminal and civil areas.

As this Court has directed, the trial judge is to make the decision on the admissibility of expert testimony, and not the court of appeals. *General Elec. Co. v. Joiner*, 522 U.S. 136, 138 (1997). The question of admission of expert testimony is an *evidence* issue, and under the framework set out in *Daubert*, and as expanded upon by more recent Supreme Court decisions, the trial court is in the best position to hear and evaluate the evidence and determine whether expert testimony is reliable, relevant, and thus admissible under Fed. R. Evid. 702. The appellate court is not to undertake a second detailed examination of the evidence, devise new and different methods for evaluating the expert evidence, or reverse the district court in order to achieve a different result. *Joiner,* 522 U.S. at 138-139; *Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 152 (1999). It is not to evaluate de novo "*how*" the district court performed its *Daubert* role, but it is only to review de novo "*whether*" the district court performed any *Daubert* analysis. *Goebel v. Denver & Rio Grande Western R. Co.*, 215 F.3d 1083, 1088 (10th Cir. 2000).

The court below acknowledges that the district court held a pretrial *Daubert* hearing, reviewed briefs, declarations and heard argument on the experts that were challenged. The trial judge further allowed defendant live cross-examination and voir dire in camera, before ruling on admissibility and allowing the experts to give their opinions. *Dodge*, 328 F.3d at 1224-1228. The court below recites that the trial court did acknowledge that she was mindful of the *Daubert* requirement and the Tenth Circuit's directions to make detailed findings, and made on

the record findings as to the admissibility of each expert. *Dodge*, 328 F.3d at 1227.

Thus, based on the face of the opinion, the *Dodge* trial judge did perform gatekeeper functions regarding the reliability and methodology of the challenged experts.

Kumho Tire holds that a separate *Daubert* hearing is not required.

> The trial court must have the same kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides whether or not that expert's relevant testimony is reliable. . . . Indeed, the Rules seek to avoid "unjustifiable expense and delay" as part of their search for "truth" and the "jus[t] determin[ation]" of proceedings. *Kumho Tire*, 526 U.S. at 152-53; *see also United States v. Alatorre*, 222 F.3d 1098, 1102-1104 (9th Cir. 2000) (holding no separate *Daubert* hearing required), *cited in Mukhtar v. Cal. State Univ.*, 299 F.3d 1053, 1064 (9th Cir. 2002).

II. Disturbing Effect on Law Enforcement Efforts

Ultimately, the Tenth Circuit, by its own statement of the standard, necessarily had to find that the enumerated efforts by the district court over years of case management in a complex environmental case involving a declared Super Fund site were "arbitrary, capricious, whimsical or manifestly unreasonable [constituted] a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Dodge*, 328 F.3d at 1223.

As a practical matter, the Opinion will hinder enforcement of environmental laws, such as CERCLA, the Price Anderson Act (42 U.S.C. § 2011 et seq.), criminal prosecutions, securities fraud, antitrust, and other cases where expert testimony is crucial. The Tenth Circuit's proposed standard and lack of guidance on limits to required *Daubert* procedures demanded by defendants will significantly increase the strain on judicial resources, requiring, as it seems, some sort of mandatory trial before trial. Such a standard will impose a significant detrimental impact on governmental agencies responsible for enforcing the laws on behalf of all citizens, and make prosecuting cases prohibitively expensive. Moreover, mass tort and environmental contamination cases to be brought by state entities will not be viable if the normal judicial processes are ignored and these cases are singled out for protracted procedures without limits.

Granting the Petition for Writ of Certiorari will allow this Court to resolve the conflict over the standard of review that now exists between the circuits and to assess the chilling ramifications of the *Dodge* opinion on the government's pursuit of both civil and criminal enforcement matters that depend in large measure upon the presentation of expert witness testimony for their successful prosecution.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Dated: October 6, 2003

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